(FEDERAL MARITIME COMMISSION)
(SERVED DECEMBER 3, 1986)
(EXCEPTIONS DUE 12-26-86)
(REPLIES TO EXCEPTIONS DUE 1-20-87)

FEDERAL MARITIME COMMISSION

NO. 86-9

A/S IVARANS REDERI

v.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO, ET AL.

Complainant Ivarans, a party to a pooling Agreement first approved by the Commission in 1972, alleges that the other six carrier members of the Agreement (respondents) have violated or are violating sections 10(a)(2) and (3) of the Shipping Act of 1984 and other laws because respondents have refused to suspend the Agreement for the year 1982 and are attempting to enforce an arbitral award that would require Ivarans, an over-carrier in that year, to pay other respondents (except for United States Lines S.A.) over $1 million. Complainant alleges that because one major carrier (USLSA, formerly Moore-McCormack) failed to make a required 40 sailings in 1982, the Agreement required automatic suspension. Respondents move to dismiss the complaint as being time-barred and for other reasons and because the dispute among the parties has been resolved by arbitration as required by the Agreement. Respondents assert that they have followed the authority set forth in the Agreement and have therefore violated no law. It is held:

(1) There is no basis in fact or in law for the Commission to dismiss the complaint without deciding the merits of Ivarans' allegations. Neither statutes of limitation, doctrines of laches, estoppel, or waiver are shown to apply. Furthermore, an arbitral decision cannot oust the Commission from jurisdiction to determine the authority conferred under an approved Agreement. However, the arbitral decision can be considered as evidence.

(2) The reasoning of the arbitral majority plus other evidence shows persuasively that the Agreement need not have been suspended for the year 1982 merely because one major carrier failed to make its required number of sailings in the trade. However, the remedy devised by the arbitral majority is not authorized by the approved Agreement and is contrary to the express remedy provided in the Agreement. Implementation of such remedy would constitute the carrying out of an unfiled, unauthorized Agreement in violation of law. However, at present, there is no evidence that respondents have violated law. If respondents attempt to implement the unauthorized remedy or if the authorized remedy provided in the Agreement remains unimplemented, any injured party may seek relief in an appropriate proceeding. It is expected, however, that the parties will follow the authorized remedy and avoid future litigation.

Elmer C. Maddy and Walter H. Lion for complainant Ivarans.
Robert L. Hoegle and Renato C. Giallorenzi for respondent Netumar.
Seymour H. Kligler, David A. Brauner, and Stephen H. Vengrow for respondents ELMA and Bottacchi.
Neal M. Mayer and Peter J. King for respondent Lloyd Brasileiro.
John W. Angus, III for respondent USLSA.

INITIAL DECISION[1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

This case began with the filing of a complaint on March 4, 1986, by A/S Ivarans Rederi (Ivarans), a Norwegian carrier operating in the foreign commerce of the United States. In its complaint, Ivarans alleged that it is a party to a revenue-pooling agreement in a northbound trade from certain Brazilian ports to U.S. Atlantic Coast ports, which agreement the Commission had approved under the Shipping Act, 1916, and which was restated under the Shipping Act of 1984. Complainant alleged furthermore that six other parties to the pooling agreement, named as respondents,[2] were engaging in or attempting to

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] (Footnote on following page.)

engage in conduct which was not authorized by the Agreement in violation of sections 10(a)(2) and 10(a)(3) of the 1984 Act, were violating the Commission's order approving the Agreement, and were violating the public policy of the United States. Ivarans asked for cease-and-desist orders or, alternatively, for damages plus interest and costs.

Because respondents claimed that the original complaint was unclear and, among other things, did not specify violations of the 1916 Act, the Act under which the Agreement had been approved and had been in effect at the time the dispute among the parties first arose, Ivarans requested permission to file an amended complaint in an effort to clarify the nature of its claims and to state its case more fully. Permission was granted, and on June 26, 1986, Ivarans filed its amended complaint which was served on that date.

In its amended complaint, Ivarans alleges that its complaint arises under the Shipping Act, 1916, and the Shipping Act of 1984, as a result of conduct by respondents which is "contrary to an order of the Commission and contrary to the written terms of a revenue pooling agreement approved by the Commission under the Shipping Act, 1916, and in effect (as restated) under the Shipping Act of 1984." (Amended complaint, para. 8.) Ivarans further alleges that respondents are "engaging in efforts to obtain pool payments from complainant despite terms of . . . Agreement No. 10027-10 . . . barring any payments for the

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[2] The six respondent carriers are: Companhia de Navegacao Lloyd Brasileiro (Lloyd); Companhia de Navegacao Maritima Netumar (Netumar); Empresa Lineas Maritimas Argentinas S.A. (ELMA); Van Nievelt Goudriaan & Co., B.V. (Hopal); A. Bottacchi S.A. de Navegacion C.F.I.I. (Bottacchi); and United States Lines (S.A.) Inc. (USLSA).

relevant period of time. Ivarans alleges that "respondents' efforts to collect pool payments are contrary to a 1980 Commission order, sections 4, 5(a), 10(a)(2) and 10(a)(3) of the Shipping Act of 1984, the terms of an approved agreement, and the public policy of the United States." (Amended complaint at para. 8.) These alleged actions, according to the complaint, "are ongoing in nature. Therefore, Complainant requests an order that Respondents cease and desist from said actions, for appropriate reparations, and for such other and further relief as may be just and proper." (Amended complaint at para. 9.) Ivarans asserts that this Commission has jurisdiction over the matter by virtue of the aforementioned provisions of the 1984 Act plus sections 11(a) and 20(d) of that Act and section 32(c) of the 1916 Act.[3]

The amended complaint contains a detailed factual background with its allegations. It alleges that the seven carriers who are parties to this case had been operating under a revenue-pooling agreement in the northbound Brazilian trade under an order of conditional approval issued by the Commission on December 30, 1980, by a 3-2 vote, in which the Commission had specified the importance of a guarantee of service through minimum-sailing requirements set forth in the Agreement and had even required the parties to revise the Agreement to specify that any change in the minimum-sailing provision must be filed with the

[3] Ivarans' claim that respondents have violated the 1916 Act refers to section 32(c) of that Act. That section provides for penalties for any person who violates an order of the Commission. Ivarans claims that respondents have modified the Agreement without filing such modification, as required by the Commission's Order of Conditional Approval of Agreement No. 10027-10, issued December 30, 1980.

Commission for approval before being implemented. After describing the general contours of the Agreement, which comprised both national and non-national flag lines and divided revenues among the Brazilian and U.S.-flag carriers on a 40-40 percent basis with 20 percent allocated to third-flag carriers and subdivided among those carriers, Ivarans focuses on a specific provision of the Agreement (Article 6(e)) which requires suspension of the Agreement under certain specified conditions. As relevant here, that Article requires suspension of the Agreement if "any party or combination of parties exceeding 1/3rd of the total pool share . . . do not provide minimum number of sailings in accordance with Article 5 . . . [the pool is] to be suspended for such duration and the pool to be resumed only when adequate service is again restored." (Amended complaint at para. 21.)

Notwithstanding the above provision requiring suspension of the Agreement, Ivarans alleges that one party to the Agreement having more than a 1/3rd share (Moore-McCormack, now USLSA) failed to maintain its required number of sailings (40) in the year 1982 and that the Agreement was therefore supposed to be suspended for that year. However, instead of suspending the Agreement for that year, Ivarans states that the six respondent carriers submitted a claim for $1,475,017 against Ivarans (an over-carrier for that year) brought the dispute to arbitration and, obtaining a favorable ruling from the arbitrators (on a 2-1 vote), have continued to seek payment in accordance with the decision of the arbitral majority. As regards this arbitral majority decision, furthermore, Ivarans alleges that it made an award of $1.2 million against Ivarans (but not in favor of USLSA, formerly Moore-McCormack) because of "the general policy of the Brazil (sic) favoring the pooling of revenue on an 80%/20% basis." (Amended complaint at para. 32.) Ivarans further alleges that this arbitral decision exceeded the authority of the arbitrators under the Agreement because it denied the applicability of the United States shipping laws and required actions contrary to those laws. (Amended complaint at para. 33.) Furthermore, this arbitral award allegedly rewrites the Agreement by eliminating the suspension provision and providing for a new formula of revenue sharing not set forth in the written Agreement. (Amended complaint at para. 34.)

Finally, Ivarans alleges that documents have been sent to Ivarans dated February 21, 1986, and March 3, 1986, relevant to the arbitral award, the latter being a "demand for payment within thirty days." (Amended complaint at para. 35.) Complainant states that it "has reason to believe that respondents are taking, or will take, further steps to collect pool payments from complainant, purporting to be entitled to such payments under the terms of the Pool Agreement or arbitration award." (Amended complaint at para. 36.)

On the basis of the above allegations, Ivarans sets forth seven "causes of action." Essentially, these "causes of action" allege that respondents' efforts to collect under the arbitral award constitute various violations of the 1984 Act because they are not authorized by the Agreement which should have been suspended for the year 1982 and that respondents are therefore attempting to carry out or are carrying out an Agreement that has not been filed with the Commission. Ivarans claims that it has suffered or will suffer a loss as a result of respondents' actions and seeks a cease-and-desist order or, alternatively, "reparations in an appropriate sum with interest and costs," as well as "Such other further and different relief as the Commission deems just and proper." (Amended complaint at pages 9-13.)

The original and amended complaint were answered by respondents (except for respondent Hopal which has entered no appearance and taken no part in the proceeding.)[4] The various answers of respondents admitted certain facts, denied others, and raised a number of affirmative defenses. More significantly, respondents Lloyd and ELMA refiled a joint Motion to Dismiss on July 3, 1986, and respondent Netumar filed its own Motion to Dismiss on the same date.[5] These motions raised a number of arguments relating to the Commission's jurisdiction to decide the dispute or to the question whether the Commission should exercise its jurisdiction under the circumstances. However, before Ivarans answered these motions, I convened a prehearing conference on June 24, 1986, to consider the best means to develop the record and decide the issues. (See Rulings Made at Prehearing

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[4] Because respondent Hopal filed no answer or appearance and took no part in the proceeding, Ivarans moved for a default judgment and other sanctions. In a ruling based on a Supreme Court decision, Frow v. De La Vega, 82 U.S. 552 (1872), which is still good law, according to more recent court decisions, I found Hopal to be in default and ordered that Hopal not be allowed to participate in the proceeding thereafter. In other words, Hopal has lost its standing and will have its interests determined by the other parties who are actively participating. (See Motion for Sanctions Granted in Part, August 5, 1986.)

[5] Respondents Lloyd and ELMA had originally filed their Motion to Dismiss on June 19, 1986, but requested permission to withdraw the motion and refile it after Ivarans had requested permission to file an amended complaint. (See Rulings Made at Prehearing Conference, served June 30, 1986, at 4.)

Conference, served June 30, 1986.) Because it appeared that the matters at issue did not involve genuine issues of material fact and that there was a reasonable possibility that the motions to dismiss would not be granted, I established a procedure by which Ivarans would tender its entire evidentiary case and arguments in the form of a motion for summary judgment, to which, of course, respondents could reply in kind. This procedure had the additional advantage of answering respondents' contentions that the complaint was inscrutable and that Ivarans had failed to make a showing that respondents had violated any law. In addition, because dismissal of the complaints for the reasons argued in respondents' motions to dismiss could ultimately be found to be erroneous, development of the record on both the substantive as well as the jurisdictional-type issues could save the parties considerable time and expense because it would avoid the necessity of the Commission's remanding the case for development of an adequate record on all the issues. My procedural rulings were not, however, to be construed to mean that I had found the motions to dismiss to be without merit. (See Rulings, cited above, at page 3 n. 3.)

As a result of these rulings, Ivarans filed its entire case in its Motion for Summary Judgment, served August 15, 1986, comprising its arguments and supporting evidence, consisting of 184 pages of documentary materials divided into 10 separately identified documents. These submissions by Ivarans also constituted its reply to the various motions to dismiss which had been filed on July 3. Replies to Ivarans' Motion for Summary Judgment were filed by respondents Lloyd, Netumar, ELMA, Bottacchi, and USLSA on October 1 and 2, 1986. I have before me, therefore, numerous issues raised by various motions to dismiss of a more preliminary jurisdictional nature and issues of a more substantive nature raised in the motion for summary judgment and replies thereto.

The Preliminary and Ultimate Issues

The motions and replies contain a variety of arguments and defenses relating to preliminary jurisdictional-type matters and to more substantive-type matters. Furthermore, some of the arguments and defenses appear in both the preliminary motions to dismiss and replies as well as in the motion for summary judgment and replies thereto.

The preliminary questions concern whether the Commission has jurisdiction or can exercise jurisdiction over the controversy because Ivarans' claims are time-barred, or Ivarans is estopped from raising its claims now or because the matter has been resolved by arbitration which was supposed to be final and binding under an approved Agreement or because there is some other legal barrier preventing the Commission from getting to the more substantive matters alleged in the complaint. The ultimate question, however, is whether Ivarans has tendered a viable case showing that respondents have engaged in conduct which is violative of the Shipping Act of 1984, as alleged, or the one provision of the 1916 Act (section 32(c)) which Ivarans claims to have been violated. I do not find that any of the preliminary arguments relating to the Commission's jurisdiction are sufficiently valid to prevent the Commission from deciding the ultimate issue. However, as to that ultimate issue, I find that Ivarans has not made a sufficient showing so as to justify a finding that respondents have violated law. More specifically, I do not find that respondents have violated law by submitting their controversy to arbitration as provided by the approved Agreement nor in failing to suspend the Agreement. Nor do I find that the submission to Ivarans of letters implementing the decision of the arbitral panel by itself constitutes proof of a violation of law. However, if respondents are contemplating implementation of the particular remedy devised by the arbitral majority, I would find such conduct to be unlawful because it appears to be a remedy not authorized by the approved Agreement.

The Preliminary Issues Affecting the Commission's Jurisdiction or the Exercise Thereof

These issues were first raised in the answers to the complaint as affirmative defenses and appeared later in the motions to dismiss. They can be classified into two categories: 1) that the Commission cannot or should not decide the merits of Ivarans' complaint because of statutes of limitation, the doctrine of laches, or the principles of estoppel or waiver; 2) that the decision of the arbitral majority should not be upset by the Commission except for egregious or exceptional reasons, not present in this case.[6]

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[6] There are additional arguments made in the motions to dismiss of a more substantive nature. For example, Lloyd and ELMA move to dismiss the first and fourth "causes of action" and the third and fifth "causes of action" in the amended complaint. The former claims concern allegations that respondents have violated or will violate the Commission's Order of Conditional Approval of Agreement 10027-10 issued on December 30, 1980, by failing to file amendments or by attempting to collect payments from Ivarans. The latter claims involve allegations that respondents are violating "the public policy of the United States" (Continued on following page.)

I do not find that the contentions made by respondents under the first category of affirmative defenses are valid. As to the second category, although the matter of the relative roles of the Commission and arbitrators under approved Agreements has not been definitively described in the past, I find that the Commission cannot be ousted from jurisdiction and that the issue really resolves itself into the question as to how the Commission wishes to treat an arbitral decision. Whether the Commission chooses to defer to the arbitral majority under a limited-review standard or whether it chooses to exercise de novo jurisdiction over the controversy while giving the arbitral decision due consideration, however, I find the first part of that decision to be supportable but the second part, i.e., the specific remedy, to be an unauthorized departure from the remedy which the Agreement specifically provides. Therefore, ultimately, I find that Ivarans has not shown that respondents have yet violated law by acting outside of their authority under the approved Agreement but that they would be in violation if they were to carry out the unauthorized remedy devised by the arbitral majority.

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[6] (Continued from preceding page.) in their efforts to implement the arbitral award. As I indicate in my discussion later, I find no violations of the Commission's Order of Conditional Approval nor any violations of law by respondents as of this time. I also agree with Lloyd and ELMA that the "public policy of the United States" is not a statutory standard set forth in the provisions of the shipping acts and, standing alone, cannot support a cease-and-desist order of the Commission, which order must be based on violations of express statutory standards. However, as Ivarans contends (Ivarans' Motion for SJ at 70-71), the standards enunciated in the 1984 Act embody the public policy of the United States. These matters will be discussed later with respect to the substantive issues.

The argument that Ivarans' claims are time-barred by either the two-year or three-year statutes of limitation set forth in section 22(a) of the 1916 Act (now 46 U.S.C. app. sec. 821(a)) and section 11(g) of the 1984 Act (46 U.S.C. app. sec. 1710(g)), respectively, essentially is that Ivarans' cause of action, if any, accrued either on November 10, 1982, when Ivarans first asserted to the other members that the agreement was required to be suspended under Article 6(e) or at a meeting of the parties to the Agreement held on January 25, 1983, at which time Ivarans knew or should have known that respondents' interpretation that the Agreement should not be suspended was contrary to Ivarans' view. (Lloyd/ELMA Motion to Dismiss, July 3, 1986, at 21.) Because Ivarans did not file its complaint until March 4, 1986, more than three years after these dates, runs the argument, Ivarans is now time-barred by both statutes.

Section 11(g) of the 1984 Act provides in pertinent part:

> For any complaint filed within three years after the cause of action accrued, the Commission shall . . . direct payment of reparations for actual injury. . . .

The previous two-year statute of limitation was set forth in section 22(a) of the 1916 Act as follows:

> The Commission, if the complaint is filed within two years after the cause of action accrued, may direct the payment . . . of full reparation to the complainant for the injury caused by such violation.

If, then, there is a valid claim for reparations, the complaint must be filed within three or two years after the "cause of action accrued." If there is no claim for reparations, however, there is no time limit to the filing of the claim. In fact, under the Commission's and court interpretations of section 22, any person could file a complaint alleging a violation of the 1916 Act even if the person had not alleged injury. See, e.g., Isthmian S.S. Co. v. United States, 53 F.2d 251 (S.D.N.Y. 1931); Cargill, Inc. v. Waterman Steamship Corporation, 21 SRR 287, 300 (1981); Pier Services, Inc. v. Portside Refrigerated Terminals, Inc., 20 SRR 99, 114-115 (I.D., adopted by the Commission, 20 SRR 499 (1980); Ace Machinery Co. v. Hapag-Lloyd, 16 SRR 1258, 1262 (1976), reconsideration denied, 16 SRR 1531 (1976).

In the present case, although Ivarans asks for reparations, it does not allege that it has paid any money at all, only that "it will suffer a loss" and it seeks a cease-and-desist order "or, alternatively . . . reparations in an appropriate amount with interest and costs." (Amended complaint at paras. 39, 42, 45, 48, 51, 54, 57; final unnumbered paragraph.) Indeed, Ivarans asks for a cease-and-desist order precisely so that respondents will not be able to compel Ivarans to pay the $1.2 million in dispute, the amount specified by the arbitral decision. Under these facts, it is premature to label the complaint as one seeking reparations. Indeed, a claim for reparations at a time when complainant has paid nothing has even been found to be "frivolous," as the Commission viewed a complaint under similar circumstances in Ace Machinery Co. v. Hapag-Lloyd, cited above, 16 SRR at 1262 ("Ace's demands for repara tions are clearly frivolous."); same, 16 SRR at 1533 ("Although Ace may now have paid the tariff rate . . . thereby removing its reparations claim from the 'clearly frivolous' category . . .").

Absent an allegation anywhere in the complaint that Ivarans has paid any money at all under the arbitral decision, I cannot find that this complaint, at this time, is one seeking reparations. Consequently, the periods of limitation set forth in the statutes quoted above simply do not yet apply. The very language of the statutes quoted makes this clear but if more corroboration is necessary, the Commission has made the point obvious. In Rascator Maritime S.A. v. Cargill, Inc., 21 SRR 1374 (1982), a case involving allegations of section 17 of the 1916 Act in which complainant had sought a cease-and-desist order as well as reparations though the latter were time-barred, the Commission stated:

> The two year limitation in section 22 of the Shipping Act, 1916 . . . applies only in requests for reparations. The complaint in this proceeding alleged violations of section 17 of the Act . . . and asked for a cease and desist order as well as reparations. Thus, the Commission retains jurisdiction over the complaint even though the actions which formed its gravamen took place more than two years ago. The Commission therefore rejects the Presiding Officer's statements concerning its lack of jurisdiction over the matter at issue.

Certain respondents argue that the complaint in this case is one seeking reparations. I do not agree.[7] Furthermore, the conclusion that

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[7] I find no merit to respondents Lloyd/ELMA's arguments that Ivarans' attempt to seek an order relieving Ivarans of the obligation to pay the $1.2 million is the same thing as a claim for reparations. Lloyd/ELMA claim that such is the implicit holding of several Commission cases. (Lloyd/ELMA Motion to Dismiss at 19-20.) They cite four cases for this argument, two special-docket cases, a tariff-violation case, and a case arising under section 18(b)(5) of the 1916 Act, a provision of that law which has been repealed. In the special-docket cases and that arising under section 18(b)(5), the complainant shippers had not paid overcharges and were not seeking to recover overcharges, and the cases either involved no violations of law (special-docket cases) or violations which could not give rise to reparations claims in any event (section 18(b)(5)). In the tariff-violation case, the complainant was dismissed because complainant had not paid the freight and the complaint did not otherwise make a sufficient showing of violations so as to survive a motion to dismiss.

a complaint is not one seeking reparations if, at the time the complaint is filed, complainant has paid nothing, and the cause of action has therefore not yet accrued is not only consistent with the Commission's view of the complaint in Ace Machinery, in which complainant had asked for reparations but had paid nothing, but is consistent with the principle that a cause of action in which reparations are sought does not "accrue" until the complainant has made some payment. That is because the cause of action is not complete prior to such payment and could not be prosecuted to a successful conclusion under such circumstances. it is elementary law that a cause of action accrues "when the plaintiff could have first maintained the action to a successful conclusion." 51 Am Jur. 2d, Limitation of Actions, sec. 107. Furthermore, it is also elementary law that a cause of action does not accrue and a statute of limitation does not therefore begin to run until "the plaintiff suffers actual injury." 51 Am Jur. 2d, Limitation of Actions, secs. 109, 110. When the action is specifically brought because of the injury or damage, i.e., where a complainant is seeking reparations, not merely a cease-and-desist order, the statute of limitation generally would not begin to run until the injury or damage actually occurred. See 51 Am Jur 2d, Limitation of Actions, sec. 135 at pp. 704-705. Thus, as the court held in Clay v. Johns-Manville Sales Corp., 722 F.2d 1289, 1292 (6th Cir. 1983):

> A cause of action accrues when a suit may be maintained upon it . . . . A suit may not be brought upon a cause of action until it exists, and a cause of action does not exist until all its elements coalesce. In civil actions for damages, two elements must coalesce before a cause of action can exist: (a) a breach of some legally recognized duty owed by the defendant to the plaintiff; (b) which causes the plaintiff some legally cognizable damage.

In the Shipping Act context, the Commission has held that causes of action do not accrue in reparations cases involving unlawful charges until the complainant has paid the unlawful charges. See, e.g., Aleutian Homes, Inc. v. Coastwise Line, 5 F.M.B. 602, 611 (1959); United States of America v. Hellenic Lines Limited, 14 F.M.C. 255, 260 (1971); Oakland Motor Car Co. v. Great Lakes Transit Corp., 1 U.S.S.B.B. 308, 310-311 (1934) (Complainant "was injured the moment he paid the charges and was the person directly damaged by the collection . . . of the illegal rates. His claim accrued at once . . ."; see also Louisville Cement Co. v. I.C.C., 246 U.S. 638, 644 (1918) (cause of action accrues when freight charges are paid); Southern Pacific Co. et al. v. Darnell-Taenzer Lumber Co. et al., 245 U.S. 531, 534 (1918) (plaintiffs suffered losses when they paid; their claim "accrued at once in the theory of the law.") In other cases the Commission has taken a very flexible view toward questions as to when a statute of limitation begins to run and has held that "[t]he determination of when a cause of action actually accrues should not be restricted by rigid theories but should be made on the facts of a particular case in light of the purposes of the statute of limitations." Military Sealift Command v. Matson Navigation Company, Inc., 21 SRR 459, 463 (1982). Indeed, as the Commission indicated in the cited case, the Commission has even held that a cause of action may not even accrue until the Commission's decision that a general rate increase was unlawful. 21 SRR at 464; see also Matson Navigation Company--Proposed Rate Increases, 19 SRR 263 (1979).

I conclude, therefore, that the present complaint, at least under the facts as they now exist, is not one for reparations because Ivarans has not paid the arbitral award. Therefore, the complaint is not time-barred under any statute of limitation.

The next preliminary argument raised by respondents is that the Ivarans complaint should not be heard on its merits because of the doctrine of laches, an equitable doctrine also having to do with time bars. Thus, respondent Lloyd argues that Ivarans has "slept on its rights," that if it believed that respondents were acting outside their authority by not suspending the Agreement in November 1982, Ivarans, instead of proceeding to arbitration, should have asked a court or the F.M.C. for a ruling that the dispute was not subject to arbitration or for a declaratory order or other relief to the effect that the Agreement was supposed to be suspended for the year 1982 and that Ivarans need not pay anything to the other carriers for that year. Instead, Ivarans proceeded into arbitration and now that the other carriers have relied upon the arbitral decision, Ivarans files a complaint belatedly with the Commission seeking the same relief. Lloyd therefore contends that Ivarans' complaint is barred by the equitable doctrine of laches, that it has waived its rights to litigate the matter before the Commission now, and that it should be estopped as a matter of law from pursuing the matter before the Commission. (See Lloyd's Reply to Ivarans' Motion for Summary Judgment at 35-40.)

The doctrine of laches has been applied when a plaintiff is guilty of inexcusable delay in asserting its rights and such delay causes prejudice to another party. See Petition of ABC Charters, Inc., 558 F.Supp. 367, 369 (W.D. Wash. 1983). These questions often are questions of fact and cannot be resolved on summary motions. See

5 Wright and Miller, Federal Practice and Procedure, sec. 1277 at 338; 10A Wright, Miller, and Kane, Federal Practice and Procedure, sec. 2734 at 425; Petition of ABC Charters, Inc., cited above; Kauffman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 464 F.Supp. 528 (D. Md. 1978). If a suit is brought within the time fixed by an analogous statute of limitation, a defendant has a heavy burden to show why the laches should apply but even if suit is brought after the limitation period has expired, a plaintiff may show that circumstances warrant non-application of laches. Shell v. Strong, 151 F.2d 909 (10th Cir. 1945). Furthermore, a court does not presume prejudice to a defendant merely because the comparable limitation period has expired. Sandvik v. Alaska Packers Ass'n, 609 F.2d 969, 971 (9th Cir. 1979).

In the instant case, as discussed earlier, Ivarans' non-reparation claim is not barred by a statute of limitation. Furthermore, the facts in this case show neither inexcusable delay in filing this complaint nor prejudice to respondents. What they show is that Ivarans proceeded into arbitration as provided by the Agreement (Article 13) and that it deferred filing this complaint until after the arbitral majority had ruled against it on December 18, 1985, its complaint being filed on March 4, 1986, less than three months after the unfavorable ruling. The facts are, moreover, that the Agreement continued in operation after 1982, the year of dispute, and respondents are not precluded from raising any defense they choose in this proceeding because of the passage of time or any other discernible reason. I therefore fail to find any basis for dismissal of the complaint because of laches. Furthermore, in view of the Commission decision cited by respondents themselves to the effect that the Commission would give no relief in complaint cases before the parties exercised their rights of arbitration under agreements, it would undoubtedly have been futile for Ivarans to have filed its complaint prior to the arbitral decision. See Firestone International Co. v. Far East Conference, 9 F.M.C. 119, 128 (1965) (shipper's complaint alleging violations of law by conference attempting to enforce dual-rate contract dismissed; parties instructed to proceed to arbitration, as required by the contract). Similarly, I find insufficient basis for application of the equitable doctrine of estoppel. Under that doctrine, a defendant's conduct or representations may have been so misleading that another person may have delayed filing suit until a statutory time period had expired or the other person may have otherwise changed position or been prejudiced by the defendant's misleading conduct. See Cooper v. Diamond M Co., 799 F.2d 176, 178 n. 3 (5th Cir. 1986). Stated another way, if Ivarans is to be estopped from filing its present complaint, there must be facts showing misleading conduct by Ivarans, reliance on such conduct by respondents, and detriment to respondents as a result of such reliance. See Port Authority of New York v. New York Shipping Association, 22 SRR 1329, 1346 (I.D., adopted by the Commission, as pertinent, 23 SRR 21 (1985)), and cases cited therein. I have no evidence before me, however, that Ivarans misled respondents into believing that if the dispute went to arbitration, as provided by Article 13 of the Agreement, Ivarans would never ask the Commission to determine whether the Shipping Act would be violated following the arbitral decision or that respondents operated differently because the matter first proceeded to arbitration, or that they were prejudiced and cannot make their defenses in this proceeding as a result of Ivarans' refusal to accept the decision of the arbitral majority. As noted before, the Agreement continued in operation after 1982. The "detriment" to respondents resulting from Ivarans' filing of its complaint is not, in fact, related to any changes in respondents' operations but merely to a delay in effectuating the arbitral award and in receiving payments from Ivarans, an over-carrier under the Agreement, for the year 1982. Similarly, there is insufficient basis in fact to find that Ivarans has waived its rights to file its complaint. The doctrine of waiver requires a showing that there has been a "voluntary, intentional relinquishment of a known right or privilege manifested either by express statement or by conduct which can only be reasonably be considered consistent with such relinquishment." Port Authority of New York v. New York Shipping Association, cited above, 22 SRR at 1346, and cases cited therein. Ivarans did, indeed, agree to arbitrate the dispute as provided by Article 13 of the Agreement. However, I have been shown no facts demonstrating that Ivarans intentionally relinquished any of its rights to file a complaint under the Shipping Act of 1984 and manifested such a relinquishment to respondents before or during the arbitration proceedings. In fact, in this proceeding, Ivarans has made it a point that it is not asking the Commission to review the arbitration award but is instead asserting its rights under the Shipping Act. See Ivarans' Motion for Summary Judgment at 23-24 n. 14. ("Any contentions that the Commission is reviewing an arbitration award are red herrings; Ivarans brings this claim to assert its Shipping Act rights.")

The real basis for respondents' contentions that Ivarans' complaint should now be dismissed without getting to the merits of the dispute actually seems to be that Ivarans, like the other parties to the Agreement, was obliged to have the dispute proceed to arbitration and was thereafter purportedly bound to abide by the decision of the arbitral panel which, according to Article 13 of the Agreement, was to be "final." Respondents, who have prevailed under that decision (except possibly for USLSA), understandably protest Ivarans' refusal to abide by the decision. They view Ivarans' refusal to abide by that decision as a violation of the Agreement which Ivarans entered into, and they consider Ivarans' present complaint to be an attempt to get a "second bite at the apple," which would undermine the integrity of the arbitration provision of the Agreement as well as all such provisions in other agreements filed with the Commission. While their resentment and concern is understandable enough, their arguments really boil down to the question whether Ivarans has the right to file such a complaint with the Commission, in other words, whether having approved an Agreement with an arbitration provision which supposedly calls for "final" decisions, the Commission should exercise jurisdiction over the controversy or even whether the Commission has any jurisdiction at all. These latter questions are more critical than the earlier ones involving time bars, estoppel, and waiver, etc., because they involve critical questions as to Commission jurisdiction and the proper role the Commission is supposed to play in resolving disputes which parties claim to have been properly assigned to arbitration by agreement of the parties and, in this case, by specific approval of the Commission.[8] I now turn to those critical questions.

The Commission's Role Vis-a-Vis the Arbitral Decision

Notwithstanding Ivarans' contention that it is not seeking a review of the arbitral decision which went against it, the nature of Ivarans' claims is such that it is not possible to avoid consideration of that decision and of the question as to how that decision is to be treated. This is because Ivarans is alleging that respondents are violating or have violated the 1984 Shipping Act by carrying out or attempting to carry out an agreement which has not been filed with the Commission, or, in other words, that respondents are attempting to act outside the

[8] Doctrines such as laches, estoppel, and waiver are equitable in nature and are designed to prevent someone from suffering harm because of the misleading or dilatory conduct of someone else upon which the first party relies. They are not designed to destroy rights conferred by Congress even if parties have otherwise privately agreed to follow certain procedures. Thus, even if Ivarans' conduct in filing its complaint with the Commission, notwithstanding its agreement to arbitrate, could be considered to be inequitable and subject to estoppel or waiver, as I discuss below, that does not necessarily mean that Ivarans has lost its right to file a complaint with the Commission alleging violations of the Shipping Act. See, e.g., TTT, Seatrain, et al. v. New York Shipping Association, 15 F.M.C. 259 (1972), affirmed, sub. nom., TTT v. F.M.C., 492 F.2d 617 (D.C. Cir. 1974), in which certain carriers which were members of the New York Shipping Association and were supposedly bound by that Association's by-laws to abide by the majority decision, nevertheless sued the Association successfully and succeeded in having the Commission modify an assessment agreement which the overwhelming majority of the Association had agreed to. See also Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. ____; 87 L.Ed. 2d 444, 462 n. 19 (1985), where the Court commented that if provisions in a sales contract "operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." (Cases and authorities cited by the Court omitted.)

authority conferred by the Agreement approved by the Commission, as amended, on December 30, 1980. (See, e.g., Ivarans' Motion at 41 n. 36.) Such conduct would be violative of sections 10(a)(2) and 10(a)(3) of the 1984 Act, which prohibit any person from operating under an unfiled, disapproved or canceled agreement, or acting not in accordance with the terms of the agreement and any of its modifications, respectively.

Ivarans alleges that respondents are acting in that way or are attempting to act outside the authority of Agreement 10027-10 because they agree to abide by the arbitral decision and award and are attempting to enforce it or to carry it out, which decision and award Ivarans believes to be wrong. Respondents, on the other hand, argue that they are merely following the terms of the Agreement which provides for binding arbitration and that any efforts to collect under the arbitral award do not constitute violations of law since the Agreement requires the parties to arbitrate and to abide by the arbitral decision.

Obviously, if the arbitral decision has correctly interpreted the authority of the parties under the Agreement, finding that the Agreement should not have been suspended for the year 1982 (as it apparently was not) and that the Agreement requires payment by Ivarans as an over-carrier of $1.2 million dollars but with the caveat that USLSA's (formerly Moore-McCormack's) share as an under-carrier should be distributed to the other parties because of that line's deliberate failure to maintain minimum sailings prescribed by the Agreement, then respondents cannot be violating law by carrying out the authority conferred by the Commission's approval of the Agreement, and there is no modification of the Agreement. However, if the decision of the arbitral majority incorrectly interpreted the Agreement and, in effect, modified it, respondents would be violating the 1984 Act if they were to fail to file the modification and if they were to carry out the arbitral decision because they would be carrying out an Agreement which had not been approved nor filed with the Commission. Therefore, one cannot determine the merits of Ivarans' allegations until one decides whether the arbitral majority decision, which respondents wish to carry out, correctly interpreted the authority contained in the Agreement.

Respondents, for the most part, argue vigorously that the Commission should not upset the decision of the arbitral majority except for unusual circumstances which do not exist in this case. They cite numerous court and Commission decisions confirming the strong policy favoring arbitration and argue the unfairness of allowing a carrier which has agreed to arbitrate to file a complaint once the arbitral decision has been unfavorable to that carrier. They argue that the Commission should not interfere with an arbitral decision which interprets but does not modify an Agreement and that the Commission should not sanction collateral attacks on arbitral decisions because of the harmful effects such action would have on arbitration provisions in approved agreements. Indeed, as Lloyd and ELMA contend (Lloyd/ELMA Motion to Dismiss at 9):

> The very fact of Ivarans' attempt to use the FMC to avoid its agreement concerning arbitration represents, in its own terms, a departure from the FMC approved agreement. If permitted, the Commission will have rendered a nullity all arbitration provisions currently contained in agreements effective under the Shipping Act, 1916 or the Shipping Act of 1984.

In the instant case, respondents argue that Ivarans has had a full and proper procedure before three distinguished arbitrators with no evidence of impropriety and that the arbitrators fully considered all arguments of all the parties before reaching their decisions. Citing court decisions, respondents (Lloyd/ELMA) contend that review of the arbitral decision is supposed to be extremely limited and that "absent corruption, fraud or undue means, a decision of arbitrators may not be set aside even if the award contains errors of law or errors on points of evidence or fact." (Lloyd/ELMA Motion to Dismiss at 40.) Therefore, they argue, the Commission should follow a "strong policy of deference to commercial arbitration" as do the courts (Motion at 41) and should uphold an arbitral award so long as it "draws its essence from the agreement in dispute." (Motion at 41.) Furthermore, "once having assured itself that the basis for the award may be found in the organic agreement itself, the Commission's inquiry should appropriately be brought to a close both as a matter of deference and as a matter of law." (Motion at 42; footnote omitted.) However, respondents Lloyd and ELMA recognize that the Commission has abandoned the rule of deference "to avert the most egregious actions" (Motion at 39) and that the Commission "should properly refuse to examine the merits of the matter submitted to arbitration or to question the validity of the arbitrators' decision" only "absent any evidence of a 'substantial violation' of the Shipping Act. . . ." (Motion at 40.)

Respondents other than Lloyd and ELMA, for the most part, seem to concur in the above arguments and stress certain points in support of them. Thus, respondent Netumar cites recent Supreme Court decisions, emphasizing the special deference to arbitration provisions that courts should exercise when such provisions appear in international contracts and the narrow scope of review of arbitral awards which should subsequently be exercised by the courts ("minimal," not an "intrusive inquiry"). (Netumar's Motion to Dismiss at 11.) Netumar acknowledges an exception to the rule of non-review in cases in which an arbitral decision appears to extend the scope of an approved agreement. In such a case, "the Commission was faced with the extreme circumstance of an arguably substantial expansion in the scope and basic authority of the agreement." (Netumar's Motion to Dismiss at 12.) Such a case is not now before the Commission, however, argues Netumar. Furthermore, contends Netumar, even Ivarans had not argued to the arbitral panel that the dispute affected United States commerce or was a matter that had been considered by the relevant governmental agencies. In other words, the dispute involved a difference of opinion among private parties to the Agreement, thereby removing the Commission's jurisdiction to review the arbitral award under the exceptional doctrine described above, which doctrine, moreover, may no longer be good law in view of the recent Supreme Court decisions requiring great deference to be given to arbitration provisions in international contracts. (Netumar's Motion at 14.) Finally, Netumar cites authorities upholding the finality of arbitral awards and the refusal of courts to reverse arbitral awards even though they may have been based upon misinterpretations of contracts. Only under a narrow, exceptional doctrine in which an arbitral award would compel a "violation of law or conduct contrary to accepted public policy" would a court refuse to enforce an arbitral award. (Netumar's Motion at 15-17.)

In a subsequent Reply to Ivarans' Motion for Summary Judgment, respondents ELMA and Bottacchi contribute to the debate concerning the proper role of the Commission vis a vis arbitral decisions. These respondents argue that the arbitrators did nothing more than interpret the Agreement, not modify it. Therefore, argue ELMA and Bottacchi, "it is not the function of the Commission to review the arbitral decision. There is no provision in any law which gives the Commission the jurisdiction to review a decision of arbitrators rendered pursuant to an arbitration provision in an agreement filed with the Commission." (ELMA/Bottacchi Reply at 5.) They proceed to argue that the arbitral decision in this case was only an ad hoc decision binding only in regard to the particular facts and that should the same situation arise in the future, another panel of arbitrators could decide the question differently. (ELMA/Bottacchi Reply at 5-6.) ELMA/Bottacchi argue, furthermore, that they do not believe that Congress intended to open the door to every disappointed party to an arbitration proceeding to claim Shipping Act violations. However, if the Commission should decide to review an arbitral award, "it should do so only if the arbitral award resulted in a discrimination, preference, rebate, retaliation or other violations of the Act referred to in section 10(b) of the 1984 Shipping Act . . ." rather than when the award merely concerned a different payment by a pool member than that which the member believed it was obliged to pay. (ELMA/Bottacchi Reply at 7.)

Respondent USLSA (formerly Moore-McCormack) is in a different situation from that of the other respondents and takes a somewhat different position. This respondent agrees with the other respondents that the Agreement did not have to be suspended under Article 6(e) because of Moore-McCormack's failure to make 40 sailings in 1982 and agrees with the first part of the arbitral majority's decision in that regard. However, USLSA believes that the arbitral majority erred in devising an award which would have distributed the share owed to it as an under-carrier to the other carriers, a solution which neither Ivarans nor the other carriers had argued to the arbitrators. Although USLSA disagrees with the arbitral majority's remedy, it states that it would not have challenged the arbitral decision and that when parties to an agreement which provides for binding arbitration agree to submit a dispute to arbitration, "they should normally be bound by the results of the arbitration." (Reply of USLSA to Ivarans' Motion for Summary Judgment at 2.) However, now that the complaint has been filed by Ivarans, USLSA acknowledges that there is precedent for the Commission to undertake some type of review of an arbitral decision and award. Such precedent "indicates an agency such as the Commission must not defer to an arbitration decision when to do so would do fundamental violence to the statutory scheme." (Case citations omitted.) USLSA believes that "[t]his precedent indicates there must be some analysis of the results of the arbitration or the parties' conduct vis-a-vis the terms of the Agreement. At the very least, the Commission must determine if the arbitration decision 'does violence' to the Acts. In order for the Commission to satisfy itself it may defer or may not defer to arbitration, it must compare the result with the terms of the Agreement." (Reply of USLSA to Ivarans' Motion at 2.) USLSA proceeds to state that "it appears inevitable" that in this proceeding there will either be "review" of the arbitral decision or "scrutiny" of the parties' conduct in seeking to enforce their interpretation of the Agreement. (Reply of USLSA at 3.) If so, USLSA urges that the arbitral remedy be set aside.

Ivarans, as mentioned, takes the position that it is not asking the Commission to review the arbitral decision and award but is instead asserting its Shipping Act rights. (Ivarans' Motion for Summary Judgment at 23-24 n. 14.) Ivarans develops detailed arguments with copious citations of authorities to the effect that "[a]n arbitration award under a Shipping Act agreement neither ousts the Commission of jurisdiction nor precludes a contrary Commission determination." (Ivarans' Motion at 39.) Ivarans cites a number of Supreme Court decisions arising under a variety of federal laws in which the Court held that parties who had lost in arbitration proceedings required by various types of contracts and agreements were nevertheless not barred from seeking independent relief available under federal statutes. Ivarans cites another recent case, furthermore, in which a federal Court of Appeals criticized and reversed a decision of the National Labor Relations Board because of that agency's excessive deference to an arbitral decision which, in the court's view, constituted an abandonment of the N.L.R.B.'s responsibilities to administer the National Labor Relations Act.

Ivarans notes cases cited by respondents in which the Commission and courts have strongly encouraged resort to arbitration rather than litigation and have enforced provisions requiring that disputes be arbitrated. However, Ivarans argues that these cases "have no relevance to issues in this case, where the parties have voluntarily arbitrated, and arbitrators refused to apply United States law." (Ivarans' Motion at 43.) Ivarans argues that those cases had to do with situations in which someone was refusing to go to arbitration and nothing to do with the situation in the present case, namely, "what happens after the arbitration." (Ivarans' Motion at 50.)

Ivarans distinguishes between a case in which someone attempts to overturn an arbitral award and one in which a person attempts to assert separate statutory rights. Thus, Ivarans contends that its complaint asks the Commission to "determine whether a Shipping Act violation exists" irrespective of any arbitration award. (Ivarans' Motion at 51.) In other words, Ivarans claims that it is asking the Commission to resolve the question, "does the conduct complained of exceed the scope of the parties' authority under the Shipping Act?" (Id.) Ivarans asserts that "[i]t is for the Commission, and the Commission alone, to determine whether parties have exceeded the authority in an agreement." (Id.) Ivarans concedes that "the existence of an arbitration award is a fact that the Commission may consider," but contends that "the Commission's role is not that of an appellate panel searching the record of an arbitration for reversible error. Rather, the Commission must independently determine whether a Shipping Act violation exists." (Id.) In determining that question, furthermore, Ivarans cites a leading case involving the question of the Commission's responsibility in defining the scope of approved agreements to the effect that it is public policy, not private intent that controls, and that the Commission is free to determine the extent of its approval of an agreement notwithstanding an arbitral decision. (Ivarans' Motion at 51-52.) Ivarans argues, furthermore, that the arbitrators in this case purported to determine the intent of the parties under Brazilian contract law, thereby ignoring the Shipping Act and statutory rights conferred thereunder. Argues Ivarans, even courts which countenance deferral to arbitrators "insist that the agency determine whether arbitrators thoroughly considered statutory rights." (Ivarans' Motion at 55.)

Ivarans argues that even under the strict, limited-review standards advocated by respondents, a court will not enforce an arbitration award if it "compels the violation of law or conduct contrary to accepted public policy." (Ivarans' Motion at 56, 71.) Furthermore, courts will refuse to enforce an arbitral award that "goes beyond the plain terms of a contract" (Ivarans' Motion at 57) nor enforce an arbitral award unless it "draws its essence" from the contract. (Ivarans' Motion at 58 n. 52, quoting a court decision.)

<u>How Arbitral Decisions are Treated or Reviewed</u>

The decisions cited by Ivarans and other parties illustrate that there are various standards for review or treatment of arbitral decisions. These standards appear to range from <u>de novo</u> decisionmaking by the court or agency with consideration being given to the arbitral decision as evidence to a far more deferential attitude toward the arbitral decision in which the court or agency retains limited review and refuses to uphold an arbitral decision only for extreme reasons. As I discuss later, however, whichever standard is employed, i.e., whether the Commission were to give limited deference to the arbitral decision or far greater deference, I would conclude that the arbitral majority was correct in finding that the Agreement need not have been suspended in 1982 but that the majority erred in devising a remedy which was not authorized by the Agreement.

At the outset, I agree with Ivarans that many of the cases relied upon by respondents had to do not with the question of what a court or agency is to do with an arbitral decision once one has been rendered but rather the question as to whether the parties should be required to go to arbitration first before filing suit. For example, respondents argue that the Commission ought not to review the arbitrators' decision absent extreme circumstances because of the strong policy encouraging arbitration and the fact that many agreements on file with the Commission provide for arbitration of disputes. In making such arguments, respondents rely upon such cases as Firestone International Co. v. Far East Conference, 9 F.M.C. 119 (1965); The Dual Rate Cases, 8 F.M.C. 14 1964); Possible Breach of Pacific Coast European Conference Rate Agreement, 17 F.M.C. 205 (1973), reconsideration denied, 14 SRR 831 (1974); affirmed in PCEC v. F.M.C., 537 F.2d 333 (9th Cir. 1976); Persian Gulf Outward Freight Conference - Dual Rate Contract, 8 F.M.C. 293 (1964); Modification of Agreements No. 150 and 3103, 11 F.M.C. 434 (1968); Scherk v. Alberto-Culver Co., 471 U.S. 506 (1974); Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., cited above, 473 U.S. _____, 87 L.Ed 2d 444 (1985).

These cases are all good authorities for the limited principles they espouse, i.e., the enforceability of arbitration provisions in agreements and contracts and the strong policy of the law favoring arbitration of disputes. Thus, they held that disputes had to go to arbitration under dual-rate contracts or that arbitrators could review decisions of neutral bodies to ensure fair procedures under self-policing provisions of conference agreements. They did not hold that after the arbitration decision was issued a person had lost his right to file a complaint alleging a violation of the Shipping Act. On the contrary, on several occasions the Commission or the courts have indicated rather clearly that aggrieved parties retained such a right notwithstanding adverse decisions of arbitrators.

In _Possible Breach of Pacific Coast European Conference Rate Agreement_, cited above, 17 F.M.C. at 205, a dispute arose out of a dual-rate contract concerning whether certain shipments made by five cotton shippers should have moved under the contract because the shippers had retained the legal right to select the carrier. The Commission ordered the dispute to proceed to arbitration under the terms of the contract and ordered the Conference to cease and desist from attempting to assess penalties or suspending the contracts pending the outcome of the arbitration (17 F.M.C. at 212). In ordering the dispute to go to arbitration, the Commission cited the general policy favoring arbitration and the enforcement of arbitration provisions, citing _The Dual Rate Cases_ and the _Firestone International_ decision (17 F.M.C. at 211-212). The Commission did two other things, however, First it suggested that "were we dealing with a dispute requiring a _legal_ interpretation of one of the contractual provisions of the Conference contract . . .," rather than a factual dispute, the Commission "might well be inclined to agree with [a shipper intervenor asking that the

Commission decide the matter rather than arbitrators]." 17 F.M.C. at 211. Second, the Commission indicated that after the arbitrators had issued their decision, "[t]he Commission, of course, always retains the right of review of any decision reached by an arbitration panel convened pursuant to an approved contract," and, furthermore, citing a previous court decision that "the Commission may upset the decision of the arbitrators where the decision is not in conformity with the Shipping Act, notwithstanding the absence of any provision to that effect in the contract." 17 F.M.C. at 213 n. 9. Thus, the Commission suggested that a dispute involving contract interpretation (such as the dispute in the present case) may not be suitable for arbitration if it involved a determination of the scope of the parties' authority under an approved agreement. Furthermore, the Commission expressly held that it retained the right of review after the arbitration decision and suggested that one standard of review that the Commission would follow would be to measure the arbitral decision against the requirements of the Shipping Act to ensure against violations of that Act.

The other cases cited by respondents add very little to these doctrines. Thus, in Firestone International, cited above, 9 F.M.C. 119, the Commission dismissed a shipper's complaint alleging that the respondent conference had been violating law by attempting to proceed to arbitration when it had reason to believe that the shipper had violated the terms of the dual-rate contract. The Commission, in other words, upheld the arbitration provision of the contract, ordering the dispute to proceed to arbitration as provided by the contract. As the Commission stated, "In this manner, the Commission has given to the parties of those dual rate contracts the opportunity to settle their differences between themselves." (9 F.M.C. at 128.) The Commission nowhere held that the Commission wanted nothing to do with the dispute after the arbitral panel had decided the matter.[9] Similarly, in The Dual Rate Cases, cited above, 8 F.M.C. at 44, the Commission approved arbitration clauses for use in dual rate contracts generally, calling arbitration "an efficient means of settling disputes under commercial contracts" and "an appropriate means of disposing of routine disputes which arise under dual rate contracts." The Commission did not hold that it would no longer have jurisdiction over such disputes after arbitral decisions had been rendered. On the contrary, the Commission indicated that arbitration was suitable for "routine" disputes and approved specific language in arbitration provisions in dual rate

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[9] Certain respondents rely upon language in Firestone International that "[a]lthough cases do arise where recourse to the Commission can be had notwithstanding arbitration provisions, this is the exception rather than the rule. We will not nullify arbitration clauses without serious cause." 9 F.M.C. at 128, cited by Lloyd/ELMA in their Motion to Dismiss, at 38. I do not read the quoted language to mean that the Commission has no responsibility under the Shipping Act after an arbitral decision. I read it rather to mean that the Commission expects parties to proceed to arbitration when disputes arise in agreements which contain arbitration clauses and not to come first to the Commission without attempting to resolve the dispute by arbitration. Indeed, in Possible Breach of Pacific Coast, etc., discussed earlier, the Commission expressly retained a right of review of arbitral decisions and indicated that it was possible on some occasions that the Commission might hear a complaint even before the dispute went into arbitration, such as when the dispute involved a pure legal question of interpretation of the scope of an approved agreement. Another case in which a party has been allowed to file a complaint under the Shipping Act even though it had not received an arbitral decision first was Port of New York Authority v. New York Shipping Association, cited above, 23 SRR 21. In that case the Commission indicated that a party need not waste its time seeking an arbitral decision if such efforts would be futile or the arbitration mechanism was not functioning properly. See 22 SRR at 1343-1345 (I.D., adopted in pertinent part by the Commission).

contracts that "nothing herein shall deprive the Federal Maritime Commission of its jurisdiction." Furthermore, the Commission stated that "the contract should not, nor cannot, oust the Commission from its jurisdiction and duties under the Shipping Act. . . ." (Id.) Subsequently, the Commission modified its decision in the Dual Rate Cases to permit deletion of specific language in contracts preserving Commission jurisdiction. See Order Granting the Deletion of Certain Clauses, 8 F.M.C. 267 (1964). However, after citing Swift & Co. v. Federal Maritime Commission, 306 F.2d 277 (D.C. Cir. 1962), the Commission stated that "arbitration may sometimes present the question of whether a particular construction of a dual-rate contract is lawful under the Shipping Act, 1916, a question which ordinarily would not be a proper matter for arbitration." 8 F.M.C. at 268. The Commission reiterated its previous language that "the terms of dual-rate contracts should not, nor cannot, relieve us of our duties and responsibilities under the Shipping Act." (Id.) However, the Commission indicated that "disputes under dual-rate contracts could . . . be properly and finally resolved through arbitration where there is no substantial question of violation of the Shipping Act involved." (Id.)

In Modification of Agreements No. 150 and 3103, cited above, 11 F.M.C. at 441, the Commission approved a system by which arbitrators would review the decisions of a neutral body to ensure procedural fairness but did not permit the arbitrators to conduct a de novo trial of malpractices. This decision did not even permit the arbitrators to perform full decisionmaking, much less allow them to oust the Commission from jurisdiction.

Of course, the leading case establishing the Commission's right to decide violations of the Shipping Act notwithstanding contrary arbitral decisions is Swift & Co. et al. v. Gulf and South Atl. Havana Conference, 6 F.M.B. 215 (1961), affirmed in Swift & Company v. Federal Maritime Commission, cited above, 306 F.2d 277, a case which some respondents try to distinguish while others acknowledge that it authorizes the Commission not to defer to an arbitral decision if that decision would "do fundamental violence to the statutory scheme." (See Lloyd/ELMA Motion to Dismiss at 1-4; 38; Reply of ELMA/Bottacchi to Ivarans' Motion at 9-13; Reply of USLSA at 2, acknowledging the authority of Swift.)

The Swift litigation involved three proceedings before the Commission, a complaint and two Commission-instituted investigations. The litigation had to do with respondent Conference's interpretation and later attempted modification of their dual-rate contract by which the Conference would bind shippers like Swift who shipped cargo from St. Louis, although the Conference agreement had been limited to Gulf and South Atlantic ports. Swift, which had been a contract signatory in 1958, was accused by the Conference of breaching the contract because in 1958 Swift had arranged for its own water transportation from St. Louis rather than use a Conference member from a Gulf or South Atlantic port as Swift had previously done. Swift denied the breach and the matter proceeded to arbitration, the majority of the arbitrators finding that Swift was in breach and ordering Swift to pay damages under the terms of the contract. Even before the arbitral decision, however, which was issued on June 10, 1959, the Conference changed the language of the contract so that it would apply to St. Louis but Swift initially refused to sign the new contract in 1959. The Commission ultimately found that the interpretation and later-filed amendment of the contract extending its scope beyond Gulf and South Atlantic ports to St. Louis was a new agreement requiring filing and approval by the Commission but that the modification was unlawful and that Swift was entitled to reparation.

The first matter that the Commission dealt with in its decision was the question whether the Commission's determination of the contract's scope had been precluded by the arbitral decision. (6 F.M.B. at 221.) Because the arbitrators could not require that Swift be bound to an unfiled modification of an agreement, the arbitral decision could only be lawful if it merely interpreted the language of the contract. The Commission made clear that an arbitral decision that, in effect, modified an approved agreement would not be lawful because such a decision would mean that the arbitrators, not the Commission, were administering section 15 of the 1916 Act by approving modifications that were not filed. (6 F.M.B. at 221-222.) The Conference then argued that the Commission "has no authority to place its interpretation on the 1958 Agreement, but must give final and binding effect to the results of the arbitration between the Conference and Swift." (6 F.M.B. at 222.) The Conference had argued further that the Arbitration Act (9 U.S.C. secs. 1-14) required that the arbitral decision be given "finality." (_Id._) The Commission, however, rejected the argument stating (_Id._):

> We find no provision of the Arbitration Act which expressly or impliedly enacts any rule of law which expressly provides for such finality or limits our authority under the Act, nor any court decision which holds that it does so by implication. There is no provision in the Act which does so either. This

> part of the exception is invalid as we have an independent responsibility to determine the scope of agreements which we approve under section 15.

In affirming the Commission, the court agreed that the arbitral decision could only have decided the meaning of the contract as intended by the parties thereto and that the Commission alone could decide the legality of the contract. In this regard the court stated that "[n]o private arbitration could negate the [Commission's] statutory power to determine the validity of the dual-rate agreement." (306 F.2d at 282.) The court proceeded as follows (Id.):

> The more serious issue is whether the [Commission] is precluded by the arbitration from awarding Swift reparations. We think not, for the arbitration opinion decided only the meaning of the Freighting Agreement, as garnered from the intent of the parties and the surrounding circumstances. (Footnote omitted.) That may have been appropriate for the arbitration, but, as we have pointed out, the [Commission's] function is to interpret and rule on the legality of the agreement's language and effect in the light of the public interest. We have examined the arbitration opinion and award carefully, but find no mention whatever of the legality of the agreement, as opposed to its interpretation.

The court also noted that the Commission's order was "not simply a private matter between two private litigants, but also has its public aspects." (Id.) Earlier, the court had stated that the agreement in question was "not simply a private contract between private parties," that "the intent of the parties is only one relevant factor," and that the Commission "must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval." (306 F.2d at 281.) Thus, it can be seen that the Commission determined that the agreement in question did not authorize the conference to serve upriver ports like St. Louis notwithstanding the fact that the arbitral decision had reached a contrary interpretation and had found Swift, a St. Louis shipper, to have been bound by the agreement.

In one other case, Port Authority of New York v. New York Shipping Association, cited above, 22 SRR at 1343-1346, the Commission heard argument from respondent Association that the complaint should have been dismissed because the complainant was obliged to have the dispute resolved through arbitration under the labor contract. The complainant had attempted resolution of the dispute through the contract machinery to no avail, however. The Commission, citing Swift and other court decisions, rejected the argument and held that it could exercise its jurisdiction to determine Shipping Act violations independently from arbitral procedures which were necessarily limited to determinations of parties' intentions, not statutory violations.

Finally, in the two Supreme Court decisions cited above, the Court emphasized the need to enforce arbitration clauses in international contracts. However, the Court did not hold that parties having private remedies under federal statutes had lost their rights to have these rights properly enforced and courts reviewing arbitral awards were to be on guard to ensure that these private rights had not been ignored. In Scherk v. Alberto-Culver Company, cited above, 417 U.S. 506, the Court did indeed emphasize the need for courts to enforce arbitration clauses in international contracts. However, the Court also stressed the fact that the federal law involved in that case, the Securities Exchange Act of 1934, did not contain specific private remedies, unlike the 1933 Securities Act, and furthermore, the 1934 Act, unlike the 1933 Act, did not prohibit a private agreement to waive rights to sue in court. 417 U.S. at 513-514.[10] The Shipping Act of 1984, of course, gives persons a private right to file complaints under section 11 of that Act, 46 U.S.C. app. sec. 1710, a right which, incidentally, has been considerably enhanced from that previously granted by the 1916 Act. See discussion in Compagnie Generale Maritime v. S.E.L. Maduro (Florida), 23 SRR 1085, 1095 (ALJ 1986).

In Mitsubishi Motor Corporation v. Soler Chrysler-Plymouth, Inc., cited above, 473 U.S. _____; 87 L.Ed 2d 444, the Court again enforced an arbitration clause in an international contract, holding that a counterclaim asserted by defendant in a federal court under the Sherman Act should proceed to arbitration under an arbitration clause in the contract under the federal Arbitration Act (9 U.S.C. sec. 1 et seq.). However, the Court relied upon representation of counsel that the arbitrators would apply U.S. antitrust law and advised that the lower courts would examine the arbitral award to make sure that the arbitrators considered and applied U.S. antitrust law when it came time for enforcement of that award. 87 L.Ed 2d at 462, and footnote 19 on that page. If the arbitral panel failed to take cognizance of the statutory cause of action under U.S. antitrust law, the Court did not decide what would be the effect "on the claimant's capacity to reinitiate suit in federal court." 87 L.Ed 2d at 462 n. 19. However,

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[10] Apparently, the Court's decision in Scherk has caused considerable difficulty among Courts of Appeals, eight of which have held that the 1934 Act does not compel arbitration notwithstanding the Court's decision in Scherk. See 55 U.S. L.W. at 1021-1022 (August 5, 1986).

the Court noted that "if the choice of forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." (Id.)

The Mitsubishi case goes as far as possible to enforce arbitration clauses in international contracts but expresses caution and instructs lower courts to make sure that a person's private antitrust remedies have not been ignored by arbitrators and indicates, furthermore, that a reviewing court could determine with "minimal" review at the enforcement stage whether the arbitral panel recognized and decided the antitrust issues and indicated that if the arbitrators had failed to consider antitrust laws, the claimant might be able to "reinitiate suit in federal court." 87 L.Ed 2d at 462 n. 19. The Court's decision reiterates its belief expressed in Scherk that private agreements to arbitrate appearing in international contracts ought to be enforced and adds the fact that parties should be held to their agreements to arbitrate even if they have private antitrust remedies. However, the Mitsubishi case did not involve one in which an arbitration decision had been issued and an aggrieved party claimed that the arbitral panel had not considered the U.S. Shipping Act. Nor did the case involve an international contract of a type which had continually been held to be "impressed with a public interest," which enjoyed antitrust immunity, and which an agency had been required to approve, in other words, a contract with consequences extending beyond the private interests of the signatory parties. But that is the type of contract which is the subject of the present case and, furthermore, the parties have already proceeded to arbitration and have obtained an arbitral decision. As indicated above, the Commission and the court in the Swift decision have indicated that the Commission has duties and responsibilities under the Shipping Act to determine the scope of approved agreements and to ensure that the Act is not violated notwithstanding decisions of arbitrators. Furthermore, in other contexts, despite the strong policy favoring arbitration, the courts have indicated that they expect courts and agencies to exercise their jurisdiction and carry out their responsibilities, albeit in harmony with arbitral decisions where possible.

In a series of Supreme Court and other court decisions arising in the domestic context, the courts have tried to describe the proper function of courts and agencies which are trying to administer federal statutes and protect federally-guaranteed rights in cases in which parties have obtained arbitral decisions under contractual provisions. Discussion of several of them cited by the parties should suffice to make the point that federal rights and remedies cannot be ousted merely by the rendering of an arbitral decision.

There are four such cases decided by the Supreme Court which bear examination. These are: Wilko v. Swan, 346 U.S. 427 (1953); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); and McDonald v. City of West Branch, 466 U.S. 284 (1984). In the latter three cases, the dispute had already been decided by arbitrators. In Wilko v. Swan, the Court held that a party could not be compelled to go to arbitration under an arbitration clause in a sales contract but could sue in court under the Securities Act of 1933. This was because the 1933 Act specifically prohibited waivers of statutory rights. The Court also expressed concern that the limited arbitral proceedings and decisions might not be adequate to protect the federally-granted rights under the 1933 Act. In Alexander v. Gardner-Denver Co., plaintiff, a discharged black employee, sued in District Court under the Civil Rights Act of 1964 after he had lost before arbitrators under procedures provided in the collective-bargaining agreement. The Court held that the employee's rights under the 1964 Act were not foreclosed because of the prior submission of the case to arbitration. The Court distinguished between the limited functions of arbitrators and the separate statutory rights of the employee. According to the Court (415 U.S. at 53):

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties. . . .

The Court quoted from an earlier case (United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)), which further described the limited responsibility of the arbitrator and his duty not to apply his own "brand of justice," as follows (415 U.S. at 53):

> An arbitrator is confined to the interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

The Court rejected arguments that it was unfair to allow the employee to sue in court after losing in arbitration, that this would give the employee "two strings to his bow," that it was unfair to bind the employer by the arbitral decision but not bind the employee, and that permitting later resort to courts would "sound the death knell for arbitration clauses in labor contracts." 415 U.S. at 54. (Similar arguments have been made by respondents in this case.) The reason why it was not unfair to allow the employee to sue later in court under the 1964 Act was that "he is asserting a statutory right independent of the arbitration process." (Id.) (This is exactly the position taken by Ivarans in this case.) The Court added that the employee was "not seeking review of the arbitrator's decision" in asserting the independent statutory right. (Id.)

The Court also rejected the argument that courts should defer to the arbitral decisions when the same claim was before the arbitrators who had authority to rule upon them under the labor contract. (415 U.S. at 55-56.) The Court found that such a deferral "would . . . deprive the petitioner of his statutory right to attempt to establish his claim in a federal court." (415 U.S. at 56.) The Court held that "Congress intended federal courts to exercise final responsibility for enforcement of . . . [the Act]; deferral to arbitral decisions would be inconsistent with this goal." (415 U.S. at 56.) The Court further indicated that arbitral procedures are not equivalent to judicial procedures and that while they were "well suited to the resolution of contractual disputes . . .", arbitration was a "comparatively inappropriate forum for the final resolution of rights created by . . . [the federal statute]."

415 U.S. at 56-57.) the Court rejected a suggested standard of deferral to the arbitral decision and concluded as follows (415 U.S. at 59-60):

> We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim de novo. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate. (Footnote citation omitted.)

Even when instructing the courts as to what factors to consider when receiving arbitral decisions into evidence when hearing federal statutory claims, the Court cautioned the courts against too great a deference to the arbitrators as follows (415 U.S. at 60 n. 21):

> But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

In Barrentine v. Arkansas-Best Freight System, Inc., an employee brought suit in court under the Fair Labor Standards Act after he had lost before the arbitrators under the labor contract procedures. The Court followed its rationale in the Alexander case and held that the employee was not foreclosed from filing suit and asserting his statutory rights under the Act merely because he had already sought relief by arbitration without success. Again, the Court held that these statutory rights were independent of the rights under the labor contract and that these rights could best be protected by courts rather than by arbitrators. The Court emphasized that the Act had given individual employees "broad access to the courts" and that "no other forum for enforcement of statutory rights is referred to or created by the statute." (450 U.S. at 740.) It held that the statutory "rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." (450 U.S. at 740.) The Court recognized that the employee's claims might have been "fairly and fully presented" to the arbitrators but that even if so, "the employee's statutory rights might still not be adequately protected . . . [b]ecause the 'specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land . . ." and "many arbitrators may not be conversant with the public law considerations underlying the [Act]." Claims arising under the Act "typically involve complex mixed questions of fact and law. . .". These statutory questions must be resolved in light of volumes of legislative history and over four decades of legal interpretation and administrative rulings." (450 U.S. at 743.) The Court noted that although "an arbitrator may be competent to resolve many preliminary factual questions . . ., he may lack the competence to decide the ultimate legal issue whether an employee's right to a minimum wage or to overtime pay under the statute has been violated." (Footnote citation omitted.) (450 U.S. at 743.) As in <u>Alexander</u>, the Court stated that the arbitral decision could be considered by the court as evidence and given such weight as it deserved under certain specified standards of evaluation. (450 U.S. at 743 n. 22.)

The fourth Court decision, <u>McDonald v. City of West Branch</u>, involved a suit brought by a discharged police officer who claimed violation of his rights under the Civil Rights Act of 1871, 42 U.S.C. sec. 1983. As in Alexander and Barrentine, the plaintiff had lost in an arbitration conducted under the labor-contract procedures. The question then arose as to whether his statutory claims were barred by the doctrines of res judicata and estoppel, i.e., whether the arbitral decision should be given binding effect so as to prevent him from asserting his statutory claim in court. The Court held that the statutory claim was not barred by these doctrines. Citing Alexander and Barrentine, the Court further held that arbitral proceedings were limited and not judicial in nature and although well suited to resolve contractual disputes, such proceedings did not provide an adequate substitute for a judicial proceeding which would protect federal statutory rights, and that "an arbitrator may not therefore have the expertise required to resolve the complex legal questions that arise in section 1983 actions." (466 U.S. at 290.) Again the Court noted, as it did in Alexander and Barrentine, that the arbitrator's expertise "pertains primarily to the law of the shop, not the law of the land," and 'because an arbitrator's authority derives solely from the contract . . ., an arbitrator may not have the authority to enforce sec. 1983 . . ." and he "has no general authority to invoke public laws that conflict with the bargain of the parties. . . ." (466 U.S. at 290.)

The Court warned that "according preclusive effect to arbitration awards in sec. 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide." (466 U.S. at 292.) However, as in Alexander and Barrentine, the Court held that an arbitral decision "may be admitted as evidence in a sec. 1983 action" and described how the court was to determine how much weight should be given to the arbitral decision. (466 U.S. at 292 n. 13.)

In considering what are the responsibilities of agencies under regulatory statutes in cases where a matter has been decided by arbitrators, the experience of the National Labor Relations Board bears examining. In probably no other area of law is the policy favoring resolution of disputes by arbitration more pronounced than in labor law for the obvious reason that resolution of labor disputes by arbitration and grievance procedures is well recognized to be better than resolution of such disputes by strikes and disruption of work. See Textile Workers v. Lincoln Mills, 353 U.S. 448, 451-456 (1957); United Steelworkers v. Warrior & G. Nav. Co., 363 U.S. 574, 577-578 (1960); Swift Industries, Inc. v. Botany Industries, Inc., 466 F.2d 1125, 1130-1131 (3rd Cir. 1972). In disputes arising under collective-bargaining agreements, the questions decided by arbitrators often overlap with rights conferred by the National Labor Relations Act. Accordingly, the N.L.R.B. has had to decide how it would determine statutory rights when such rights had apparently been considered and determined by arbitrators under collective-bargaining agreements. Over the years, the N.L.R.B. has developed rules by which it determines how it will deal with a particular case which has gone to arbitration and how it will treat the arbitral decision. This area of labor law is too detailed for extended discussion. However, a recent court decision traces the development of that agency's standards of deferral and illustrates that even though public policy strongly favors arbitration in labor areas, it is dangerous for an agency to defer too greatly to arbitrators because such a policy may result in the agency's abdication of its responsibilities under its statute.

In Taylor v. N.L.R.B., 786 F.2d 1516 (11th Cir. 1986), the court reversed the N.L.R.B. which had deferred to the decision of a grievance committee under a deferral standard which the N.L.R.B. had recently revised. The court held that the N.L.R.B. had surrendered too much of its responsibility to the arbitrators under its newly revised standards. The court decision traces the development of the N.L.R.B.'s deferral standards. As the court states, initially, the N.L.R.B. enunciated the standard that it would defer to an arbitral decision if: 1) the arbitral proceedings were fair and regular; 2) all parties had agreed to be bound; and 3) the decision of the arbitration panel was not clearly repugnant to the purposes and policies of the Act. (786 F.2d at 1518.) Later the N.L.R.B. added a fourth requirement: 4) that an unfair labor practice issue must have been fully and fairly developed at the arbitration level. (Id.) As the court continues, the N.L.R.B. began to run into trouble when it started to revise the above standards of deferral. First, it modified the above standard by requiring the grievant to prove that there were "unusual circumstances" which had prevented the grievant from presenting his evidence of an unfair labor practice. Then, in the face of criticism, the N.L.R.B. withdrew this modification and added a new one, namely, that it would not defer to the arbitral decision unless that decision indicated that the arbitrators had not ruled on the statutory issues. (786 F.2d at 1519.) When this newly formulated modification resulted in too few deferrals to the arbitrators, the N.L.R.B. again modified its deferral standards. It stated that it would defer to arbitrators' decisions which were not clearly repugnant to the Act and had considered the unfair labor practice issues if the contractual issues considered by the arbitrators were "factually parallel" to the statutory issues and the arbitrators were presented with the facts relevant to resolving those issues. Furthermore, unless the arbitral award was "clearly repugnant" to the Act or "palpably wrong," the N.L.R.B. would defer to the arbitral decision. (786 F.2d at 1519.) An award would be found to be "palpably wrong" if the arbitral decision was "not susceptible to an interpretation consistent with the Act . . ." (786 F.2d at 1519-1520). The Court rejected these new modifications of the Board's deferral standard. The court stated that the Board had swung too far in the direction of deferral, stating as follows (786 F.2d at 1520):

> [T]he NLRB has a statutory duty to enforce the . . . Act and exclusive jurisdiction to decide unfair labor practices. The Board may not avoid this responsibility through a far-reaching deferral policy which apparently presumes that an unfair labor practice claim has been resolved through arbitration.

The court cited, among other cases, the Supreme Court's decisions in Alexander, Barrentine, and McDonald, cited above, and held that under its new standards, the Board was presuming that all arbitration proceedings confronted and decided every possible unfair labor practice issue. Thus, the court found that the Board had given away too much of its responsibilities under the NLRA. (786 F.2d at 1521-1522.)

Whatever the present standard of deferral to arbitrators by the N.L.R.B. may be as a result of the court's remand in Taylor, two things seem clear: 1) an agency with statutory responsibility should be very careful before deferring to arbitrators when statutory rights are involved; and 2) it is dangerous for the agency to presume that an arbitral panel has considered and resolved statutory claims.

A final area to consider before deciding exactly what role an agency should play when arbitral decisions have been rendered, which decisions purportedly decide issues raised by complainants before the commission, is the general law applicable to enforcement of arbitral awards. As respondents note, generally, courts will enforce arbitral awards absent corruption, fraud, or undue means (which are not alleged in the present case) and judicial review of arbitral awards is extremely limited because of the strong federal policy in favor of voluntary commercial arbitration. (Lloyd/ELMA Motion to Dismiss at 10-12, citing Hanes Corp. v. Millard, 531 F.2d 585, 597 (D.C. Cir. 1976); Devine v. White, 697 F.2d 421, 436 (D.C. Cir. 1983), and other cases.) Nor will courts set aside arbitral awards because of procedural or legal errors unless the errors are so gross as to suggest impropriety. See discussion in 5 Am Jur 2d, Arbitration and Award, secs. 167, 168; Vacation of Arbitration Award, 20 ALR Fed 295, 307 (1974); Newark Stereotype v. Morning Ledger, 397 F.2d 594 (3rd Cir. 1968), cert. den 393 U.S. 954 (1968); 6 C.J.S., Arbitration, §§ 1, 2, 162.

Notwithstanding the general reluctance of courts to set aside arbitral awards, there are recognized grounds for such action. These have been codified in the U.S. Arbitration Act of 1925, 9 U.S.C. secs. 1-14. Under that law arbitral awards may be vacated by courts if they were procured by corruption, fraud, or undue means, where there was evident partiality or corruption in the arbitrators, where there has been some type of misbehavior by the arbitrators resulting in prejudice to a party, or "where the arbitrators exceeded their powers . . .". (See 9 U.S.C. sec. 10(a) through (d); quoted language appearing in sec. 10(d); see also discussion in Vacation of Arbitration Award, cited above, 20 ALR Fed at 307-309.) Under the last category (arbitrators exceeding their powers) courts have vacated awards where the award provided remedies inconsistent with the arbitration agreement or other documents through which the parties agreed to arbitrate. See Vacation of Arbitration Award, 25 ALR Fed at 349-352. Furthermore, courts have interpreted the Arbitration Act as permitting them to vacate awards which are in "manifest disregard of the law." Vacation of Arbitration Award, 25 ALR Fed at 365-367. Thus, courts will vacate arbitral awards if it appears that the arbitrators have modified plain and unambiguous contract provisions or ignored them or if the award would compel a violation of law or be contrary to public policy. See Storer Broadcasting Co. v. American Federation of Television & Radio Artists, 600 F.2d 45, 47-48 (6th Cir. 1979) (arbitrator cannot disregard or modify plain contractual provisions); Granite Worsted Mills, Inc. v. Aaronson Cowen Ltd., 255 N.E.2d 168, 170-171 (N.Y. 1969) (arbitrator cannot make an award based on a different basis than that provided in the contract); Swift Industries, Inc. v. Botany Industries, Inc., 466 F.2d 1125, 1131-1134 (3rd Cir. 1972) (award of arbitrator which created new remedy not contained in agreement vacated); Campbell v. Farmers Insurance Exchange, 67 Cal. Reptr. 175, 179 (Cal. Appl. 1968) (parties not bound to arbitral award, although they had agreed to be bound, when award exceeded contract limits); Publishers Ass'n v.

Newspaper & Mail Del. Union, 114 N.Y.S. 2d 401, 404-406 (App. Div. 1952) (arbitral award not enforceable if it compels violation of law, work stoppages, or modifies an express provision of the labor contract); Dunau, Three Problems in Labor Arbitration, 55 U.Va. L. Rev. 427; 429-430; 439; 442; 447; 453; 458 (1969) (arbitrators cannot exceed authority, expand contract terms, violate public policy, etc., under cases discussed although author recommends narrow judicial review of arbitral awards); Revere Copper and Brass, Inc. v. Overseas Private Investment Corp., 628 F.2d 81, 83 (D.C. Cir.) cert. den., 446 U.S. 983 (1980) (arbitral award not enforceable if it compels violation of law or conduct contrary to accepted public policy).

It should be noted that one respondent acknowledges that an arbitral award can be reviewed and presumably vacated if an award is in "manifest disregard of law." (Lloyd Reply to Ivarans' Motion for Summary Judgment at 37.) Furthermore, certain respondents appear to acknowledge that Commission review and vacation of an arbitral award would be proper or that there be a de novo trial if there is "evidence of egregious conduct in violation of Shipping Act precepts" (Lloyd Reply to Ivarans' Motion at 48); or "if the arbitral award resulted in discrimination, preference, rebate, retaliation or other violations of the Act referred to in section 10(b) of the 1984 Shipping Act" (ELMA/Bottacchi Reply to Motion at 7); or if the arbitral award "does violence to the Acts" (USLSA Reply to Motion at 2, 11).

Ivarans' Case Evaluated Under Applicable Standards

The previous discussion provides the necessary background to determination of the question as to how Ivarans' case is to be evaluated. On the basis of previous Commission statements and especially the Swift case, i conclude that Ivarans' case should be evaluated on its merits by the Commission by evaluating the arguments and evidence supporting its case and by giving due consideration to the arbitral decision as evidence.

In the first place, I agree with Ivarans that this case does not involve an appellate review of the arbitral decision but requires a de novo determination of the legal authority of the parties under an approved agreement. I agree with the court in McNair v. United States Postal Service, 768 F.d 730, 736 (5th Cir. 1985) which characterized the Alexander, Barrentine and McDonald cases, cited above, as holding that plaintiffs were asserting independent statutory rights and were not seeking review of arbitral decisions which were, in any event, limited to interpretation of a private contract, not public law. Under such a view, the court stated:

> Accordingly, the cases hold that federal courts are not required to give preclusive effect to arbitration awards when an aggrieved employee asserts an independent cause of action, though it arises from the same conduct submitted to the grievance process, for violation of certain federal statutes . . . . The theory of these cases is that "in instituting an action under [the statutes], the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." (Citation omitted.) Moreover, the Court has concluded that "Congress intended the statutes at issue to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings." (Citation omitted.)

Similarly, in this case, this Commission was set up by Congress as the expert body to determine rights granted under the Shipping Act. No arbitrators can usurp this function nor do they purport to since "an arbitrator's competence and authority are limited to the interpretation of the collective bargaining agreement and the application of 'the law of the shop, not the law of the land.'" McNair v. United States Postal Service, cited above 768 F.2d at 736, quoting from Alexander. This conclusion is fortified, furthermore, by the fact that agreements approved under section 15 were always regarded as being "impressed with a public interest" and were not considered to be merely agreements among private parties. Swift & Co. v. Federal Maritime Commission, cited above, 306 F.2d at 281 (approved agreement "is not simply a private contract," the intent of the parties is only one relevant factor, etc.); In Re: Pacific Coast European Conference, 7 F.M.C. 27, 37 (1961) ("Respondents' conference agreement is not some sacrosanct private arrangement but a public contract, impressed with the public interest and permitted to exist only so long as it serves that interest"); States Marine Lines v. Trans-Pacific Conference, 7 F.M.C. 257, 259 (1962) ("Conference agreements are not private contracts to be interpreted as the parties please or prefer, but have significant public aspects."); Trans-Pacific Freight Conf. - Self Policing System, 7 F.M.C. 653, 656 (1963) ("Private contracts, normally between two parties, cannot reasonably be equated with agreements approved under section 15," which agreements attempt to reconcile divergent interests consistent with congressional policy and the public interest in the free flow of our foreign commerce); Possible Breach of PCEC Rate Agreement, cited above, 14 SRR at 834 ("We see a great distinction between a general contract between two private parties and a contract whose existence and implementation is subject to the provisions of the Shipping Act, 1916. Termination of a contract which is an agreement subject to the Act and invested with the public interest is an action not controlled solely by contract law. In short, the Shipping Act provides the preemptive principles where contractual rights are in dispute."; Agreement No. 9955-1, 18 F.M.C. 426, 465-466 (1975) (Commission not limited to terms of agreement in maintaining surveillance over the activities of the parties to it to ensure compliance with the Shipping Act.); States Marine Lines, Inc. v. F.M.C., 4 SRR 21,089, 21,095 (D.C. Cir. 1967) (conference agreements are not wholly voluntary and are not wholly private but are subject to Commission regulation).[11]

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[11] Certain respondents argue that the 1984 Act made significant substantive changes from the 1916 Act and that the Commission cannot therefore constitutionally apply the 1984 Act to pre-Act grievances. (Lloyd/ELMA Motion to Dismiss at 31-32.) Because I find that respondents have not done anything unlawful either before or after the enactment of the 1984 Act, I need not decide the merits of the argument. However, if the argument means that pooling agreements filed with the Commission have become purely private contracts and no longer have any public aspects, I disagree. True, the Commission no longer holds pre-approval hearings and no longer approves such agreements. However, the Commission is still authorized to "disapprove, cancel, or modify any agreement . . . that operates in violation of this Act." Section 11(c)), 46 U.S.C. app. sec. 1710(c). Parties must file the agreements with the Commission (section 5(a)), are specifically prohibited from certain activities (section 10(c)), and are specifically required to adhere to the terms of their filed agreements (sections 10(a)(2) and (3). Moreover, how is the Commission to determine whether parties have violated sections 10(a)(2) or (3) if it is not authorized to determine the scope of the authority of parties under such agreements. Of course, parties to agreements were also required to operate within the authority of those agreements under the 1916 Act as well as under the 1984 Act. See, e.g., Persian Gulf Outward Freight Conference (Agreement 7700), 10 F.M.C. 61 (1966) affirmed under the name Persian Gulf Outward Freight Conference v. F.M.C., 375 F.2d 335 (D.C. Cir. 1967).

Because approved agreements (or even filed agreements under the 1984 Act) are not merely private contracts, the Commission becomes the tribunal which ultimately decides what it meant when it approved the agreement in the first place. Furthermore, as the Commission indicated even when it ordered a dispute as to the question whether certain shippers had breached a dual-rate contract with the conference, the Commission might not have taken that action but might have decided the question directly itself "were we dealing with a dispute requiring a legal interpretation of one of the contractual provisions. . . ." Possible Breach of PCEC Rate Agreement, cited above, 17 F.M.C. at 211.[12] Moreover, in the Dual Rate Cases, cited above, the Commission approved the use of arbitration for "routine" contractual disputes but also indicated that "the question of whether a particular construction of a dual-rate contract is lawful under the Shipping Act, 1916" is a question "which ordinarily would not be a proper matter for arbitration." 8 F.M.C. at 268. I find no indication from these cases that the Commission wished to defer to arbitrators on questions involving legal interpretations of approved agreements or the scope of authority which the Commission initially conferred by its approval of an agreement and no indication by the court in Swift that it expected the Commission to abdicate its unique responsibility to determine such questions. Nor do I find that later Supreme Court decisions in Scherk or Mitsubishi, cited

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[12] The holding that a matter that deals with legal questions rather than factual ones is less suitable for arbitration, espoused by the Commission, finds support in the Supreme Court's statement that an arbitral decision may be entitled to greater weight if it involves only factual issues. See McDonald, cited above, 466 U.S. at 293 n. 13, quoting from Alexander and Barrentine.

above, strongly encouraging arbitration for international contracts, have changed the situation. As I have mentioned earlier, in Scherk, the 1934 Securities Act did not provide for a specific private remedy and in Mitsubishi, the Court left open the possibility that a private antitrust claim could be reinitiated in federal court after arbitration under what was a private contract. The agreement in this case is, as discussed, not a private contract and, furthermore, the Shipping Act of 1984 not only provides remedies but enhanced those remedies as compared to the 1916 Act. See Compagnie Generale Maritime v. S.E.L. Maduro (Florida), cited above, 23 SRR at 1095. Accordingly, I find that the Commission may properly determine the scope of the parties' authority to suspend their agreement and to require Ivarans to pay its over-carriage revenues to other carriers except for USLSA notwithstanding the fact that arbitrators have already considered these matters. However, I believe the Commission may follow the Supreme Court's instructions in McDonald, Alexander, and Barrentine that "an arbitral decision may be admitted as evidence." McDonald, cited above, 466 U.S. at 292 n. 13, and that the decision may be given weight after consideration of such factors as the degree to which provisions in the agreement conform with the statute, procedural fairness, adequacy of the record, the special competence of the arbitrators, the extent to which the arbitrators considered statutory rights, etc. (Id.) However, even were I to believe that the Commission is confined to only a limited review of the arbitral majority's decision and that the Commission could only upset it on a finding of "egregious" conduct, "manifest disregard of law," or "violence to the Act," as certain respondents argue, or that the arbitrators "exceeded their powers," so that even a court would vacate the arbitral award, I would reach the same conclusions. Under a de novo or a limited review standard, I find that the parties did not have to suspend their agreement for the year 1982 but that the remedy devised by the arbitral majority, depriving USLSA of its share as an under-carrier for that year, is not authorized by the Agreement.

Analysis of Ivarans' Case

"A claimant is entitled to summary judgment only when no genuine issue of material fact exists, the papers on the motion demonstrate his right to relief, and every one of the defenses asserted legally are insufficient." (Footnote citation omitted.) 10A Wright, Miller, and Kane, Federal Practice and Procedure, sec. 2734 at 404. Summary judgment, therefore, is appropriate when there are no genuine issues of material fact and the question essentially boils down to a question of law, and may be granted even if "the question of law is important, difficult, or complicated." Aho v. Erie Mining Co., 466 F.2d 539, 541 (8th Cir. 1972), quoting Barron and Holtzoff, Federal Practice and Procedure, sec. 1234 at 127-128. The Supreme Court has recently given the summary judgment procedure a strong boost as a means to "secure the just, speedy and inexpensive determination of every action." See Celotex Corporation v. Catrett, ____ U.S. ____, 54 U.S.L.W. 4775 (June 25, 1986). Furthermore, the Court has also authorized lower courts to scrutinize the case of a party moving for summary judgment to determine if the party has tendered sufficient evidence as to the claim so that a finding could be made in the party's favor under applicable legal standards. Anderson v. Liberty Lobby, Inc., ____ U.S. ____, 54 U.S.L.W. 4755, 4759 (June 25, 1986). In case of doubt because evidence submitted by the movant appears to disagree with that of the non-moving party, inferences favoring the non-moving party are to be drawn. Id. Summary judgment becomes increasingly appropriate "when underlying historical facts are undisputed." See Schwarzer, Summary Judgment Under Federal Rules, 99 F.R.D. 465, 471 (1984), and when the issues relate more to the questions of law than fact or involve matters of law or policy. Schwarzer, cited above, at 472-473. Contract interpretations may involve factual disputes as to the parties' intentions. However, the ultimate question may still remain one for the court and, of course, will clearly so remain if there is no conflict in the evidence. Schwarzer, cited above, at 474-475. It is, furthermore, not necessary to go to trial to develop a factual record if a record is inadequate but such record may be developed through summary-judgment techniques. Schwarzer, cited above, at 475.

Ivarans has tendered its entire case with supporting evidence and arguments and has moved for summary judgment. Respondents have been afforded a similar opportunity to proffer their evidence and arguments. No one argues that a summary judgment procedure is improper in this case.[13] I find, furthermore, no genuine issue of material facts and

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[13] Respondent Lloyd has taken the position that the arbitral award is not under review and that it is not necessary or proper to engage in a de novo interpretation of the agreement. (Lloyd Reply to Ivarans' Motion at 15.) Therefore, Lloyd states that it declines to engage in briefing or argument as to the proper interpretation of Article 6(e) of the subject Agreement. (Id.) Nevertheless, Lloyd does argue in favor of its interpretation of Article 6(e) of the Agreement (Lloyd Reply
(Continued on following page.)

that the questions involve mainly the correct interpretation of an agreement approved by the Commission. Accordingly, Ivarans' case may be evaluated without trial-type hearings or further development of facts.

More Specific Evaluation of Ivarans' Case

Ivarans' case essentially is that by the very terms of the subject Agreement, in Article 6(e), the pooling agreement was supposed to be suspended for the year 1982 and that Ivarans, accordingly, as an over-carrier for that year, does not have to make any payments to the under-carriers for that year. Ivarans alleges that respondents' attempts to implement an arbitral majority's decision requiring it to pay $1.2 million to under-carriers except for USLSA violates the Commission's Order of Conditional Approval of Agreement No. 10027-10, constitutes a modification of the Agreement, and violates sections 10(a)(2) and 10(a)(3) of the 1984 Act because respondents are attempting to act or have acted outside the scope of their authority under the Agreement and have not filed the alleged modification to their Agreement which the arbitral majority's decision embodies.

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[13] (Continued from preceding page.)
at 32-33) and as to the question of whether respondents acted in violation of the 1984 Act. Lloyd also argues that summary judgment would be appropriate but only if the Commission does not "undertake a de novo effort to interpret Article 6(e) . . . ." (Lloyd Reply at 9.) Having had the opportunity to present evidence and arguments as to all the issues and chosen to limit its presentation, I do not believe that Lloyd should be heard to complain if the Commission undertakes de novo decisionmaking. Such a role for the Commission rather than merely limited review of an arbitral decision was clearly a possible role in view of the many cases cited by Ivarans in its motion for summary judgment.

The core of Ivarans' claims is set forth at pages 66 through 69 of its Motion for Summary Judgment. Its argument is that Article 6(e) of the subject Agreement is not ambiguous and that it expressly requires that "when a party or combination of parties with a share greater than 33 percent fails to complete its minimum sailings, 'either for reasons of their own or [force majeure],' and Article 5(a) without ambiguity set a minimum of 40 sailings for the U.S. flag combination of parties," the pool is to be suspended. (Ivarans' Motion for SJ at 66-67.) In the year 1982, there is no dispute that Moore-McCormack (now USLSA) which was entitled to a 40-percent share of pool revenues, made only 34 or 35 sailings, not the 40 sailings required by Article 5(a). Therefore, the Agreement was supposed to be suspended for the year 1982 and the arbitral majority and respondents have incorrectly attempted to create an ambiguity between Article 6(e) and Article 6(a), which latter article provides for reduced pool shares when a party fails to maintain its minimum sailings rather than suspension. Notwithstanding the language of Article 6(a), Article 6(e) is not ambiguous and should be read literally. Ivarans claims that the arbitral majority refused to do this but instead applied the "spirit" of the Agreement and Brazilian policy. (Ivarans' Motion for SJ at 68-69.) Moreover, even if Article 6(e) were ambiguous, it should be construed against the national-flag lines which allegedly drafted the Agreement. (Ivarans' Motion for SJ at 69.) Ivarans challenges the validity of the arbitral majority's decision, asserting that the majority ignored the terms of the Agreement and the Shipping Act and applied Brazilian law and policy. Ivarans asserts, furthermore, that Ivarans was, in effect, forced to join the pooling agreement because of Brazilian decrees so that the Agreement is a "contract of adhesion," and that it would be unjust not to suspend the Agreement for the year 1982 when Moore-McCormack deliberately withdrew ships from the trade. Ivarans claims that two letters sent by the conference Administrator, Mr. Frank R.A. Levier, one dated February 21, 1986, and the other, March 3, 1986, seeking payment by Ivarans of $1.4 million, constitute the carrying out of an unfiled, unauthorized agreement by respondents and that respondents have even commenced action to collect payments in Brazil even after Ivarans filed its complaint. (Ivarans' Motion for SJ at 77.) In support of its claims, Ivarans submits a number of proposed facts mainly drawn from documents and public records. Specifically, Ivarans submits a copy of Agreement No. 10027-10, the Commission's Order of Conditional Approval of that Agreement issued on December 30, 1980, the arbitral decision and award of December 18, 1985, and Arbitrator Hearn's dissenting opinion, Ivarans' statements submitted to the arbitrators, a letter from Moore-McCormack relating to its decision to reduce its sailings below the minimum required, the aforesaid letters from the Conference Administrator, a governmental Memorandum of Consultation, and a letter from Ivarans advising the Administrator that Ivarans would not pay the money in issue pending determination of the legal questions involved.

Respondents' main defenses have been discussed earlier in connection with their motions to dismiss. Mainly, respondents contend that they have followed the terms of the approved Agreement by submitting the dispute to arbitration as required by Article 13 of the Agreement and that they cannot be found to have violated law when they specifically follow the procedures set forth in the Agreement. In addition to moving for dismissal of the complaint on the preliminary grounds discussed (e.g., statutes of limitation, laches, estoppel, waiver) and to arguing that the Commission ought not to upset the arbitral majority's decision absent "egregious" conduct, "manifest disregard of law," or something similar, as previously discussed, they contend that the letters which Ivarans cites as evidence of violation are merely "routine internal administrative functions of the pooling agreement operating in the manner permitted under the Agreement," citing Articles 9(e) and 9(g) regarding periodical statements of accounts and settlements. (Lloyd Reply to Motion for SJ at 22-24.) In other words, respondents contend that they have acted at all times within the express authority of their Agreement and that neither they nor the arbitral majority has modified the Agreement at all but even if there was a modification, it only related to routine, internal matters which do not require separate filing with the Commission. (Lloyd Reply to Motion at 24-34.)

Respondents cite a number of "admissions" by Ivarans and other facts showing that Ivarans would presumably not have filed the complaint had it won before the arbitrators, that it would suffer no harm if the Agreement is not suspended for the year 1982, that respondents have not taken action in Brazil to enforce the arbitral award, that the respondents' and arbitral majority's interpretation of the Agreement disfavoring suspension favors continued service and the status quo, that in 1982 the parties exceeded the aggregate minimum requirement for sailings (108) which was the original quid pro quo for approval of the

Agreement by the Commission and its Brazilian counterpart, and that the subsequent adjustment of accounts in accordance with the arbitral majority's decision does not affect the basic Agreement and is an internal, "interstitial" matter rather than a fundamental modification of the parties' authority under the Agreement. (Lloyd Reply to Motion for SJ at 16-34.)

Arguments of USLSA

Respondent USLSA, as I have previously mentioned, disagrees with other respondents in certain matters. USLSA agrees with the other respondents and with the arbitral majority that the Agreement should not have been suspended for the year 1982. USLSA contends that the Agreement should be read as a whole in the light of its purposes and that the background to Article 6(e) (which appeared in the original Agreement as Article 6(c)), shows that when Agreement No. 10 was approved in 1980 there was no intention to give third-flag carriers the right to claim suspension, provided that the national-flag lines maintained 80 sailings a year, as they did. USLSA argues that the arbitral majority was correct in relying upon this background and was correct in their interpretation of it. (Reply of USLSA to Motion for SJ at 12-13.) Furthermore, USLSA contends that Ivarans' interpretation would lead to an illogical result because it would cause the pool to be suspended after 11 months of the pool year had elapsed although there is no showing that service was inadequate during that period of time because of Moore-McCormack's particular shortcoming in sailings. On the contrary, the trade actually received 23 sailings in excess of the national-flag line minimum requirement and 73 sailings in excess of all the pool members' requirements. (Reply of USLSA at 13-14.) USLSA argues that Ivarans' interpretation of Article 6(e) is that failure of Moore-McCormack to make its minimum sailings is a "per se inadequacy" within the meaning of that Article, which makes no sense when sailings as a whole exceeded minimum requirements. (Id.) Moreover, argues USLSA, there is no evidence that Ivarans became an over-carrier and thus subject to making payments because of Moore-McCormack's sailings deficiency. In fact, Ivarans itself reduced its sailings between 1981 and 1982 by almost 14 percent, was an under-carrier in two of the four pools (although overall was an over-carrier) and Ivarans would have been an over-carrier even if Moore-McCormack had maintained all of its required sailings. (Reply of USLSA at 15-16.)

USLSA argues that the arbitral majority applied principles of contract interpretation which were not unique to Brazilian law but which actually follow American law as well and that Ivarans itself argued to the arbitral panel that there was no conflict between Brazilian and American law in this regard because both laws require a determination of the mutual intent of the parties. (Reply of USLSA at 16-20, and 16 n. 6.) As to the intent of the parties, USLSA argues that the Agreement was not silent on the question of what happens when a major carrier fails to meet its required number of sailings. Rather, the Agreement provides arguably for two solutions, suspension under Article 6(e), or reduction of shares under Article 6(a). (Reply of USLSA at 19.) However, if the Agreements and these Articles are read as a whole, it appears that the parties' intention was not to suspend under the circumstances of this case, i.e., one national-flag line fails by 5 (sic) sailings but the total sailings of all pool parties far exceeded the required minimum. (Id.) Furthermore, even if Article 6(e) regarding suspension was supposed to apply, USLSA points out that the Article is not clear as to how and when the suspension period is to be determined and when "adequate service is resumed" under the language of that Article. (Reply of USLSA at 20-21.)

As to the question whether respondents have violated the Shipping Act, USLSA contends that no violations can be demonstrated "when the parties simply seek to enforce a properly rendered arbitration decision." (Reply of USLSA at 10.) However, although USLSA states that it would not have challenged the arbitral majority's particular remedy, now that Ivarans has filed a complaint and review of that remedy seems inevitable, USLSA contends that the remedy was incorrect. (Reply of USLSA at 2-3.) Specifically, USLSA argues that Article 6(a) regarding reduction of shares "clearly took precedence over Article 6(e)." (Reply of USLSA at 10.) In other words, USLSA argues that instead of taking its share of revenues (over $1.2 million) for the year 1982 and distributing it to the other carriers, as the arbitral majority would do, Article 6(a) merely provides for a proportionate reduction of USLSA's share for 1982. (Id.) In effect, the arbitral majority has therefore suspended the Agreement after all by devising a new remedy which no one had urged. (Reply of USLSA at 10, 23-24.) USLSA also disagrees with the arbitral majority's decision requiring USLSA to bear 84.35 percent of the costs of the arbitration and to an alleged defect in the arbitrator's accounting which failed to credit USLSA's overcarriage in the general-cargo pool as required by normal pool accounting mechanisms. (Reply of USLSA at 10-11; 24 and 24 n. 9.)

DISCUSSION AND CONCLUSIONS ON THE ULTIMATE ISSUES

Although I agree with Ivarans' arguments regarding the preliminary issues and the duty of the Commission to exercise its jurisdiction as to Ivarans' assertions of Shipping Act violations, I cannot find that Ivarans has tendered evidence or arguments showing that respondents have carried out modifications to their Agreement at this time. Furthermore, all the available evidence concerning the background to the subject Agreement and the correct interpretation as to whether the parties should have suspended it for the year 1982 suggests that the arbitral majority was correct in finding that Article 6(e) did not require suspension of the Agreement for that year. After reviewing this evidence and the arbitral decision, I find that I agree with USLSA's conclusion that "[i]t simply is illogical to assume the Agreement requires suspension when the trade received far in excess of the minimum service . . . and the Agreement itself provides a far less draconian method of dealing with the lines' sailing deficiency." (Reply of USLSA at 15.) Furthermore, I find the arbitral majority's decision (except for the particular remedy it chose) to be well reasoned and entitled to be given some weight as evidence, under the guidelines enunciated by the Supreme Court in McDonald, cited above, 466 U.S. at 292 n. 13.

The Arbitral Majority's Decision

On analysis, I find that the arbitrators, in effect, followed American law in attempting to ascertain the intention of the parties under principles of contract interpretation and in their use of what little evidence as to the deliberations of the parties who first created the Agreement existed.[14] Their conclusion essentially was that the history of the original Agreement and its Amendment No. 10 in 1980 did not show that Article 6(e) was intended to give third-flag carriers a right to claim suspension of the Agreement when a national-flag carrier with a one-third share like Moore-McCormack failed to make five or six required sailings out of 40 and when the national-flag lines as a group met the 80-sailing requirement for that group. They further concluded that principles of contract interpretation state that a contract is to be read as a whole and in the light of the objects and purposes of the contract. (Arb. dec. at 50-51.) In so interpreting the words of a contract, these principles also state that courts should not construe the words literally but in their context so as not to be the "destroyer of bargains." (Arb. dec. at 51.)

The arbitral majority noted that there were ambiguities in the Agreement. Thus, Article 5(a) shows both 80 and 40 sailings for the national-flag lines as a group and for individual groups of

[14] Indeed, as USLSA pointed out, even Ivarans had argued to the arbitrators that there was no conflict between Brazilian and American law as far as principles of contract interpretation are concerned. Even Arbitrator Hearn, who disagreed with the majority, found that there was no conflict between Brazilian and American law in this regard and that the result should be the same regardless of which law was used. (Hearn opinion at 1.)

national-flag lines. However, Article 6(a) refers specifically to the exact problem which occurred, namely, "that a party shall fail to maintain the minimum number of sailings per pool period as specified" with the exception of force majeure situations. In such cases, Article 6(a) provides not for suspension but for a reduction of the share that the deficient carrier would otherwise enjoy. (". . . then the pool share of such a party shall, for the applicable accounting period, be reduced in direct proportion to the reduction in minimum sailings" and the share of the other parties within the appropriate group where the deficiency occurs "shall be increased by the same amount.") (Arb. dec. at 52-53.) Article 6(a) therefore shows an intention that any deficiency by a carrier in a national-flag group will be made up by others in the same group. (Arb. dec. at 54.) Of course, respondents make exactly that argument, namely, that it was always their intention that if a national-flag carrier failed to make required sailings, other carriers in that group would make up the deficiency, as, in fact, happened in 1982.

The arbitral majority recognized that Article 6(a) appears to conflict with Article 6(e) because, literally, if a carrier or a combination of carriers "exceeding 1/3rd of the total pool share for reasons of their own [or because of force majeure] do not provide minimum number of sailings in accordance with Article 5 or are unable to provide sufficient space for cargo covered by this pooling Agreement, the pool to be suspended for such duration and the pool to be resumed only when adequate service is again restored." (Arb. dec. at 53-54, and Article 6(e) of the Agreement.) However, the arbitral majority determined that Article 6(a) should be preferred over Article 6(e), in other words, continuation of the Agreement rather than suspension. This was because such an interpretation "prescribes the continued operation of the pool, rather than its suspension, by means of a reduction in the pool share of the [deficient line]" and is in accord with the "spirit of the Agreement, the context of the articles and the principle of good faith governing contractual interpretation" under "the circumstances of this case. . . ." (Arb. dec. at 53-54.) Although Ivarans attacks the arbitral majority for resorting to the "spirit" of the Agreement and for applying Brazilian law, principles of contract interpretation under American law also favor effectuation of contracts when possible, look to the purpose and "spirit" of the contract, read its provisions in the light of those purposes, disfavor undue emphasis on literal meanings of isolated words, etc.[15]

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[15] Thus, basic principles of contract interpretation and construction under American law, which apparently exist under Brazilian law, are as follows:

1) that the primary rule in construction of contracts is that the intention of the parties is to be ascertained and given effect (17 Am Jur 2d, Contracts, sec. 244); 2) that in construing contracts, their spirit and purpose must be considered and will prevail over the dry words of the contracts (17 Am Jur 2d, cited above, at sec. 246); 3) that in construing contracts, the contracts are considered as a whole and their meaning gathered from the entire context and not from particular words, phrases, or clauses or from detached or isolated portions of the contract (17 Am Jur 2d, cited above, at secs. 258, 259); 4) that if a contract can be interpreted in two ways, one which would render it illegal or ineffective and the other legal and effective, the latter interpretation is preferred (17 Am Jur 2d, cited above, at sec. 254); 5) that a literal or technical construction of an isolated or special clause should be not used to defeat the true meaning of the contract which is to be determined from all its provisions (17 Am Jur 2d, cited above, at sec. 253); 6) that a reasonable construction of a contract is preferred to one that is unreasonable and if the words can be
(Continued on following page.)

The above interpretation, which finds that the parties' intended to apply Article 6(a) rather than the suspension Article 6(e), also accords with the purpose of the original Agreement when it was first submitted to the Commission. The Agreement, which was the culmination of years of effort to reach a commercial arrangement in the face of Brazilian desires for the national-flag lines to carry 80 percent of the cargo was designed to maintain the 80 percent for national flag, 20 percent for non-national flag allocation of cargo. Thus, if the other carriers in the national-flag group make up the Moore-McCormack deficiency in sailings, as they did in 1982, this basic objective is preserved and there is no reason to suspend the Agreement. (Arb. dec. at 54-56.)

The arbitral majority, furthermore, found that under the facts as they were in 1982 "automatic suspension" of the Agreement would be "an extreme hypothesis" and that such suspension ought to occur only when there were serious situations of force majeure described in Article 11 (e.g., war, strikes, embargoes, fire, earthquakes, etc.). In such situations there would be "a substantial reduction of service, capable

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[15] (Continued from preceding page.)
interpreted in two ways, that interpretation is preferred which avoids an unusual, impractical or unreasonable result (17 Am Jur 2d, cited above, at sec. 252); 7) that the scope of a contract is not necessarily to be fixed in absolute accordance with the literal meaning of language used (17 Am Jur 2d, cited above, at sec. 242, p. 630); 8) that courts do not rewrite contracts to make them more equitable to one of the parties which has entered into the bargain (17 Am Jur 2d, cited above, at sec. 242); 9) that although ambiguities in contracts are construed against those persons who drafted the language, this does not mean that an unreasonable interpretation is permitted, such as by focusing on an isolated clause in dispute without examining the entire contract (17 Am Jur 2d, cited above, sec. 276); 10) that the parties' conduct and interpretation are entitled to consideration (17 Am Jur 2d, cited above, at 274).

of affecting the trade and such a situation cannot be remedied by other carriers in the same category." (Arb. dec. at 56.) In such serious situations, furthermore, all carriers should be permitted to enter the trade without restriction because of need for service. However, in the present case all that happened was that five or six sailings out of 108 were not made by Moore-McCormack although other national-flag carriers more than made up the deficiency. (Arb. dec. at 56-57.) Under such circumstances there is no justification for suspension of the Agreement. In other words, the arbitral majority believed that the parties intended that suspension under Article 6(e) be reserved for serious disruptions in service which were not or could not be made up by other carriers and that a sailing deficiency such as Moore-McCormack's required only application of the reduced-share penalty provided in Article 6(a). This conclusion was fortified by additional language of Article 6(e) which indicates that the parties thought of suspension in terms of serious situations in which service became inadequate overall and provided for the suspension to be lifted "only when adequate service is again restored." (Arb. dec. at 57-58, and Article 6(e).)

Additional Evidence and Analysis

I find the arbitral majority's reasoning to be persuasive and to be well constructed on the basis of available evidence and the arguments of the parties, and not to conflict with American law as far as determining the intention of the parties under principles of contract interpretation is concerned. Standing alone, this decision may be sufficient to show that respondents have not violated the Shipping Act by failing to suspend the Agreement in 1982 and by pursuing a final accounting for the year 1982 (provided that the particular remedy devised by the arbitral majority in the second part of their decision is not pursued.) However, there are additional evidence and reasons for my conclusion.

First, the Agreement itself specifically provides in Article 5(h) that "[i]t is understood that a party's failure to make the minimum sailing calls specified in this Agreement shall not constitute a breach of same but will be subject to provision of Article 6." (This language also appeared in the original Agreement as Article 5(g).) It indicates that the parties did not regard a carrier's failure to meet its minimum-sailings requirement to be a breach of the Agreement but was a matter to be dealt with either by the reduced-shares penalty provision in Article 6(a) or, if a serious disruption of overall service as discussed above, by suspension. Therefore, any of Ivarans' claims of unfairness because of Moore-McCormack's failure to make five or six of its required sailings must be considered in the light of the fact that Ivarans signed an Agreement (originally in 1972) in which it specifically understood that such a failure would not be considered a breach. This also applies to the arbitral majority when it devised a novel remedy by giving USLSA's share as an under-carrier to the other carriers because of the majority's feelings of "equity," "general principles of contract law," and belief that Moore-McCormack had "failed to fulfill its own obligations" under the contract. (Arb. dec. at 60.)

Second, the decision of the arbitral majority is deficient in a certain significant way and must be supplemented. That is because the arbitral majority, although correctly applying contract law to determine the parties' intentions, seems specifically to have failed to recognize that the Agreement was approved by the Commission under section 15 of the 1916 Act and only went into existence by virtue of that approval. As the court in Swift made so clear, the Agreement "is not simply a private contract between private parties, the intent of the parties is only one relevant factor . . . and the [Commission] must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval." Swift, cited above, 306 F.2d at 281. Therefore, Ivarans is correct in pointing out that the arbitral majority, to some extent, apparently ignored the Shipping Act.[16] Indeed, the arbitral majority plainly stated (Arb. dec. at 48):

> No rule or precedent of U.S. law has been called to the attention of the Tribunal which conflicts with the primacy which must be given to the mutual intention of the parties. The approval by the F.M.C. or Brazilian authorities cannot alter the rules of contract interpretation.

Evidently the arbitral majority was unaware of the Swift decision. However, because it is for the Commission to determine what the Commission intended by the authority it conferred on the parties under a section 15 agreement, even had the arbitral majority known of the Swift

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[16] A reading of the arbitral decision and of the Statement of Defense dated October 1, 1984, which Ivarans submitted to the arbitrators (Appendix to Ivarans' Motion for SJ at 128-172) shows that Ivarans called the attention of the arbitrators to the Federal Maritime Commission and the Shipping Acts of 1916 and 1984 and to certain requirements of filing and adherence to filed agreements, etc. However, I do not see any reference to the Swift decision nor any Ivarans argument to the arbitrators that the intention of the parties is only one relevant factor and that the Commission has jurisdiction to determine the scope of agreements.

case it is doubtful whether they could have issued a definitive interpretation. Even though the Commission may have little or no disagreement with the arbitral majority's determination as to the parties' intent, nevertheless consideration must be given to the Commission's intention as best it can be ascertained from the history of the approval of the Agreement, the reasons for the approval, and the standards of approval under section 15 of the Act, under which law the original Agreement and all of its amendments through No. 10 were filed and approved. In this regard it is well to bear in mind that the Commission did not confine itself to a mere reading of language in filed agreements but exercised an active role by analyzing filed agreements and measuring them against the standards of approval as enunciated by the Supreme Court under the leading case of Federal Maritime Commission v. Svenska, 390 U.S. 238 (1968).

To understand what the Commission intended by its approval of the original Agreement and Amendment No. 10 and specifically what the Commission would intend to happen when a carrier like Moore-McCormack failed to make all of its sailing in 1982, and to understand how the dispute among the pool members reached the Commission after arbitration, it would be helpful to discuss a few salient facts.

The original Agreement (No. 10027), which was approved by the Commission on january 30, 1973, established a pooling and sailing arrangement among six carriers consisting of three Brazilian and U.S. national-flag carriers (Lloyd, Netumar, Moore-McCormack) and three third-flag carriers (ELMA, Hopal, and Ivarans). The Agreement apportioned freight revenues among the six carriers according to certain percentages with 80 percent of th revenues going to the national-flag lines while 20 percent was allocated to the third-flag carriers. In addition, the parties were required to maintain minimum sailings in the trade with 80 sailings assigned to the national flag line group and 33 assigned to the third-flag carriers, subdivided 12, 15 and 6 among ELMA, Ivarans, and Hopal, respectively. Other articles of the original Agreement concerned detailed implementation and accounting, adjustments of shares in the event of failure to maintain minimum sailings, suspension of the Agreement, arbitration in case of disputes, cancellation, and other matters.

The Commission's approval on January 30, 1973, which was conditioned on some minor modifications, followed upon the submission of a memorandum by the parties to the Commission in early December 1972, which explained that the Agreement was the culmination of many years' attempts to reach agreement, to substitute commercial decision in place of governmental decree, and to stabilize a trade that had been characterized as "troublesome." The commercial agreement was also considered to be consistent with certain government-to-government meetings and understandings which, among other things, encouraged carriers to enter into revenue-pooling agreements.[17]

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[17] See the Brazilian and U.S. Governments' Memorandum of Consultation, March 7, 1970, in Appendix to Ivarans' Motion for SJ at 1; F.M.C.'s conditional Order of Approval, December 30, 1980, Appendix at 23-25; Arb. dec. at 55-56. Further details of the troubled background in the subject trade and the many efforts to reach an agreement can be found in the Memorandum which the original parties to the Agreement (all the parties to this case except for Bottacchi) submitted to the Commission, dated December 27, 1972.

The original Agreement underwent 10 modifications, including one which established separate pools for four classes of cargo: containerized, general, coffee in bags, and cocoa in bags. The last amendment (No. 10027-10) was approved by the Commission on December 30, 1980. This amendment, as significant here, broke down the 80 percent revenue share of the national-flag line group and the 80 sailings of the national-flag group into 40-40 percent shares and 40-40 sailings divided between the Brazilian and U.S.-flag carriers. These breakdowns within the national-flag group had previously been set forth in a separate agreement (No. 10028) which had been approved with the original Agreement No. 10027. Agreement No. 10028 was discontinued upon the merger of its terms into the basic agreement. Amendment No. 10 also redefined shares and minimum-sailing requirements of the third-flag carriers,[18] required certain direct port calls in Brazil, reduced a party's share for failure to make required calls, and required submission of any agreement permitting a new entry of a non-national-flag line to the appropriate governmental authority for approval.

From 1973 until most of 1982, the Agreement apparently worked without difficulty as far as this record shows. However, in 1982, Moore-McCormack, an original party to the agreement, later succeeded by USLSA, failed to maintain 40 sailings as provided in Article 5(a), instead providing either 34 or 35 sailings for that year.[19] In late

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[18] Another third-flag carrier has since joined the Agreement (Bottacchi).

[19] (Footnote on following page.)

1982, it became apparent to Ivarans that Moore-McCormack would not complete its minimum number of sailings for 1982. In November of that year, Ivarans notified the pool administrator that, in Ivarans' opinion, Moore-McCormack's failure to satisfy the minimum-sailing requirement meant that the Agreement would be suspended for the entire year 1982. Ivarans relied upon the words of Article 6(e) of the Agreement (originally, Article 6(c)), which provided, among other things, that if any party having more than one-third of the pool-revenue shares did not maintain its minimum assigned sailings, the pool would be suspended and would be resumed only when adequate service was restored. Under the Agreement, as amended by Amendment No. 10, Moore-McCormack was to have a 40-percent share of revenues.

The other parties to the Agreement (respondents in this case) requested meetings with Ivarans to discuss the matter. These other carriers disagreed with Ivarans' interpretation of the Agreement's suspension provisions, and the parties were unable to resolve their differences. At stake was over $1 million which Ivarans, as an overcarrier, would be obliged to pay to other members of the Agreement if the Agreement were not suspended. Because the parties were unable to resolve their dispute, on May 3, 1983, respondents served Ivarans with a

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[19] One Moore-McCormack sailing took place within the first ten days of 1983. Respondents would count that sailing as a 1982 sailing under Article 5(g) of the Agreement which allows a ten-day grace period "in satisfaction of the required minimum sailings/calls specified." If so, then Moore-McCormack provided 35 sailings. If, however, Ivarans is correct and the extra January sailing cannot be counted because Moore-McCormack did not satisfy its minimum-sailings requirement in 1982, the correct number is 34. It is unnecessary to resolve this minor dispute because, in either case, Moore-McCormack failed to make the 40 sailings required. (See Ivarans' Motion for SJ at 20 n. 11.)

Notice of Arbitration, as provided by Article 13 of the Agreement.[20] Three arbitrators were appointed. Mr. Carlos de Cordeiro de Mello, a former Administrator of SUNAMAM, the Brazilian Maritime Authority, was appointed by respondents; Mr. George H. Hearn, then Senior Vice-President of Waterman S.S. Corporation and former Federal Maritime Commissioner, was appointed by Ivarans; and when the two arbitrators were unable to agree on a third arbitrator, the parties requested the Inter-American Commercial Arbitration Commission (IACAC) to select a third arbitrator. The IACAC selected Dr. Eduardo Jimenez de Arechaga, a former World Court Judge (and President) and a Uruguayan national.

On May 13, 1984, the arbitrators decided by a 2-1 vote (Arbitrator Hearn dissenting) to hold the proceedings in Rio de Janeiro, Brazil, and further decided that in the absence of agreement by the parties and pursuant to the rules of IACAC, they would apply Brazilian law, explaining, among other reasons, that Brazil was the country with the most ties to the Agreement, was "the center of gravity of the legal relations," that Rio de Janeiro was the city where under Article 9 of the Agreement, the pool accountant had his center of operations, and that the cargo subject to the Agreement originated in Brazil. The arbitral majority, however, also noted that they perceived no conflict

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[20] In the Notice of Arbitration, six claimants (Lloyd, Netumar, USLSA, ELMA, Hopal, and Bottacchi) stated that their claim against respondent Ivarans "arises out of the Respondent's wrongful unilateral declaration of a suspension of the Agreement and the Respondent's refusal to acknowledge the final 1982 Pool Statement as issued by the Pool Accountant as stipulated by Article 9 of the Agreement. The amount involved in this claim is (US) $1,475,017." The claimants also asked for a determination of the duration of the pool period for 1982 and damages in the above amount plus interest, costs, and attorney's fees incurred in the arbitration proceeding. (Arb. dec. at 7.)

between Brazilian and U.S. law, stating that "as recognized by Defendant [i.e., Ivarans] the applicability of Brazilian Law instead of US Law does not result in any real conflict with regard to this question." (Arb. Dec. at 48.) As noted above, however, the arbitral majority also stated that:

> No rule or precedent of U.S. Law has been called to the attention of the Tribunal which conflicts with the primacy which must be given to the mutual intention of the parties. The approval by the F.M.C. or Brazilian authorities cannot alter the rules of contract interpretation. Both Civil Law and Common Law systems rely on the mutual intention of the parties rather than clinging literally to the words of an agreement. (Id.)

Evidence and arguments were presented before the arbitrators in several stages. Respondents presented their Statement of Claim which was followed by a Statement of Defense by Ivarans. Respondents then submitted a Reply and Ivarans followed with its rejoinder. Problems arose during the arbitral proceeding concerning requests for document production, and consideration was given at one time to the possibility of hearing oral testimony. However, after Ivarans had obtained what it considered to be an admission as to Moore-McCormack's reasons for its failure to maintain 40 sailings in 1982, and after certain evidentiary rulings, Ivarans and the other parties agreed that the arbitrators should decide the matter on the basis of the written claims and defenses contained in the documents submitted to the arbitral panel. (Arb. dec. at 34-41; Ivarans' Motion for SJ at 24 n. 15.) As noted above, after considering all the arguments of the parties, the arbitrators decided by a vote of two to one that the Agreement did not have to be suspended for the year 1982 but that when Ivarans made payment to the other pool members, Moore-McCormack's (now USLSA's) share ($1.2 million) should go to the other parties on a pro rated basis. The minority member of the arbitral panel (Arbitrator Hearn) agreed with Ivarans that the Agreement should have been suspended for the year 1982 and concluded that the remedy devised by the arbitral majority was unauthorized by the Agreement.

In determining the parties' and the Commission's intention when it approved the Agreement, a number of other facts bear noting. First, Moore-McCormack had reduced its sailings to 34 or 35 for the year 1982 from 47 in 1981 although cargo had increased overall by 4.8 percent from 1,057,023 revenue tons in 1981 to 1,118,045 in 1982. Overall, the carrier members of the Agreement had reduced sailings from 198 in 1981 to 181 in 1982. However, the Agreement only required 108 sailings so that the parties provided 73 sailings more than the minimum required. Moreover, by the time Ivarans noticed that Moore-McCormack would not meet its minimum sailings and claimed that the Agreement should be suspended for the entire year 1982, the national-flag lines had already overfulfilled their 80-sailings requirement (and presumably by November the overall number of 108 would have been satisfied). (See Lloyd Reply to Motion for SJ at 32 n. 30, citing minutes of a pool meeting held on November 19, 1982.)

Second, even though the parties far exceeded the required number of sailings in 1981 (reaching 198), Ivarans was still an over-carrier for that year and had to pay $1,098,760. (Arb. dec. of Hearn at 10.) As seen, Moore-McCormack had made 47 sailings for the year 1981. Nevertheless, Ivarans was still a heavy over-carrier. Therefore, one cannot find that the fact that Moore-McCormack reduced sailings from 47 to 34 or 35 necessarily means that Ivarans became a heavy over-carrier as a result. Furthermore, as USLSA notes, had Moore-McCormack made its minimum sailings of 40 for the year 1982, Ivarans would not have challenged the 1982 pool results any more than it did the 1981 results. (Reply of USLSA at 5.) Furthermore, if the argument is made that Moore-McCormack's reduction in sailings caused an inadequacy of service because of increased cargo tonnage in 1982, and if this argument is supposed to mean that Moore-McCormack had failed to fulfill its obligations to provide adequate service under the Agreement, then the other parties may also be guilty because sailings declined overall and Ivarans in particular reduced its sailings from 29 in 1981 to 25 in 1982. (Arb. dec. of Hearn at 10.)[21]

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[21] Both the arbitral majority and Arbitrator Hearn concluded that Moore-McCormack failed in its fundamental duty "to actively and aggressively compete for all available cargo . . ." under Article 1(c) because of the line's deliberate decision to reduce sailings. Both felt that it would be unjust to allow Moore-McCormack to have any share of the pool revenues. However, the arbitral majority's solution was to give that line's entire share to other carriers while Arbitrator Hearn's solution was to suspend the Agreement altogether for the year 1982. (Arb. dec. at 58-65; arb. dec. of Hearn at 10-13.) As I discuss later, I fail to find persuasive evidence that Moore-McCormack's reduction in sailings from 40 to 34 in 1982 was the direct or even a major cause of Ivarans' position as an over-carrier in 1982, considering the fact that the other lines also reduced their sailings in that year and Ivarans was a heavy over-carrier in 1981 when Moore-McCormack made 47 sailings. Furthermore, although the arbitrators may have felt that Moore-McCormack had breached its obligations because of its sailings deficiency, the parties specifically agreed otherwise in Article 5(h), stating that failure to make minimum sailings "shall not constitute a breach" of this Agreement. However, as USLSA points out, the Agreement need not be suspended to protect against "unjust enrichment" of Moore-McCormack because the Agreement already provides for that. Thus, Article 6(a) provides for reduced shares and Article 7(c) for "undercarriage" forfeitures." (Reply of USLSA at 22.)

Finally, although this precise problem did not arise in the past, six members of the Agreement believe that it was not supposed to be suspended under the facts of this case even though three of this group (ELMA, Bottacchi, and Hopal) were also over-carriers for the year 1982 and could have but did not argue in favor of suspension in order not to have to make payments as over-carriers. (See statements of account attached to the February 21 and March 3, 1986, letters in the Appendix to Ivarans' Motion for SJ; see also arb. dec. at 6.)

The Commission's Intentions

Before approving any agreement under section 15 of the 1916 Act, the Commission would determine whether the agreement "was required by a serious transportation need, [was] necessary to secure important public benefits or [was] in furtherance of a valid regulatory purpose of the Shipping Act." Svenska, 390 U.S. at 243. See also Agreement Nos. 9847 and 9848, 14 F.M.C. 149, 155-156 (1970) (approval of Brazilian pooling agreement under Svenska standard; benefit to carriers found in trade affected by Brazilian cargo preference laws); Agreement Nos. 9929-3 et al., 22 F.M.C. 146, 147 (1979) (Commission does not approve agreements as negotiated by private parties "without independently analyzing the agreements' form, content and probable effect . . .; Commission has an affirmative duty to independently evaluate all section 15 matters in light of relevant statutory criteria. . ."); Order of Conditional Approval of Agreement No. 10027-10 at 3 (appendix to Ivarans' Motion for SJ at 24.)

If Ivarans' contention is correct and the Agreement should have been suspended for the entire year 1982 because Moore-McCormack failed to make five or six required sailings, then this means that both the parties and the Commission intended:

1) that the Agreement should be suspended even if there were more sailings than the total of 108 required by Article 5(a);

2) that the Agreement should be suspended because Moore-McCormack made only 34 or 35 sailings in 1982 instead of its required 40, a 12.5 to 15 percent deficiency in sailings, and a reduction of service, on average, from one sailing every 1.3 weeks (for 40 sailings) to one sailing every 1.5 weeks (for 34 sailings a year);

3) that the Agreement should be suspended retroactively for the entire year 1982 even though Ivarans did not notice that Moore-McCormack would not meet its 40 sailings until October 1982 and it is not shown that Ivarans acted any differently because of Moore-McCormack's failure as far as providing sailings or earning revenues are concerned;

4) that the Agreement should be suspended even though of the seven parties to it, only one (Ivarans) interprets the Agreement to require suspension under the facts of the case and even other parties (such as ELMA, Bottacchi, and Hopal) which were over-carriers and would be relieved of payments if the pool were suspended, believe the pool should not be suspended and had so argued before the arbitral panel;

5) that Article 6(e), providing for suspension, refers not only to a failure of a carrier having a one-third share to make all of its sailings but also to adequacy of service. However, it does not matter if any sailing deficiency of Moore-McCormack's was more than made up by

other national-flag carriers in 1982. The failure to make even one sailing by Moore-McCormack in December 1982 would literally trigger suspension retroactively for the entire year;

6) that although Ivarans and other third-flag carriers originally signed an Agreement which did not provide for anything other than 80 sailings by the national-flag group, the Amendment in 1980, by which a further breakdown into 40-40 sailings was brought into the Agreement, gave Ivarans the right to call for suspension although no one made any such mention of such an intention at the time the amendment (No. 10) was filed in 1980;

7) that although the Agreement provides for a specific penalty in the event that a carrier fails to make its required number of sailings (Article 6(a)) and, therefore, that the Agreement is to continue, the Agreement is nonetheless to be suspended for precisely that reason;

8) that the benefits and purposes of the Agreement, which was supposed to bring peace and stability to a trade buffetted by mal-practices and Brazilian cargo-preference laws and decrees would be suspended because of a failure of one major carrier to make five or six sailings in 1982 out of the carrier's required 40, and that the Agreement would resume only at some unspecified time when service, which did not become adequate within the meaning of the Agreement, would theoretically again become adequate.

Perhaps the single most cogent fact showing that Ivarans' reliance on literal language of Article 6(e) is misguided, although understandable, is the fact that if one disregards the portion of Article 6(e) that refers to adequacy of service being restored and concentrates only on the literal language that "a party . . . exceeding 1/3rd of the total pool share" does "not provide minimum number of sailings," the results could be absurd. Thus, literally, if Moore-McCormack had failed to make its 40th sailing in mid-December, say, of 1982, but all other parties had more than fulfilled their sailings requirements, the Agreement would have to be suspended for the entire year 1982, i.e., back to January. Furthermore, it would not be resumed until someone could determine at which time service again became adequate even though under such facts service could well have been more than adequate throughout the entire year. (See Reply of USLSA at 13-16, and 20-21.) Nevertheless, if one Moore-McCormack sailing was missed in December of any year, literally, under Ivarans' interpretation of Article 6(e), the Agreement would have to be suspended for the entire year regardless of the effect such suspension would have on the benefits and purposes of the Agreement.

Earlier I referred to a number of principles of contract interpretation which apply in American and apparently, to some degree or other, in Brazilian law. (See pp. 72, 73, footnote 15, above.) Application of these principles shows quite vividly that Ivarans' interpretation of the Agreement is unsupportable and violates virtually every one of those principles. For example, Ivarans concentrates on literal language of a portion of Article 6(e), ignoring not only the rest of that Article regarding adequacy of service but Article 6(a) and the overall intention and purposes of the Agreement and the parties thereto. Furthermore, it construes an ambiguity between Articles 6(a) and 6(e) so as to make the Agreement ineffective and reaches an unreasonable, impractical result. Furthermore, every other party to the Agreement, even those who would have benefited from its suspension, believes that the Agreement should not have been suspended. Moreover, if Ivarans is correct, then the Commission also intended such an unreasonable narrow interpretation and would sanction suspension of an Agreement supposed to produce benefits because of one missed sailing by a major carrier and even though the Agreement provides for specific penalties in case of missed sailings or undercarriage in Articles 6(a) and 7(c).

I conclude, therefore, that the reasoning and evidence in this record shows persuasively that the Agreement need not have been suspended in 1982 under the circumstances of that year.[22]

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[22] Ivarans argues that the Agreement was drafted by the national-flag lines and that as recognized by American contract law, any ambiguity should be construed against those lines. It also argues that it was, in effect, forced to join the Agreement if it wished to carry cargo in the trade because of Brazilian law, since repealed. (Ivarans' Motion for SJ at 69, 75.) I do not have evidence as to exactly who drafted the Agreement which, as USLSA noted, "involved parties who speak five different languages." (Reply of USLSA at 17.) However, resolving the ambiguity in accordance with Ivarans' interpretation leads to absurd results, as I have discussed. Moreover, when the original Agreement was submitted for approval to the Commission in December of 1972, it was supported by a 23-page Memorandum, dated December 27, 1972, which is still in the Commission's files and is officially noticeable. (Rule 226(a), 46 CFR 502.226(a).) This document explains the long troubled history of the Brazilian trade and the many attempts to reach commercial agreement. It is signed by Thomas E. Stakem, counsel for six carriers who are parties to this case (not including Bottacchi which was not an original party to the Agreement). The first carrier named in the list of six is "A/S Ivaran Rederi." No carrier asked that the Agreement not be approved because of coercion. Furthermore, the Commission would probably not have approved a coerced Agreement. See Inter-American Freight Conference, 14 F.M.C. 58, 72 (1970). (The cited case provides an interesting discussion of the troubled history of the Brazilian trades and efforts to reach agreement.) If there was "coercion," Ivarans was free to protest the agreement, as apparently one party to the agreement in the cited case actually did. (Id.)

The Particular Remedy Devised by the Arbitral Majority

Although I am impressed by the quality of reasoning shown by the arbitral majority in dealing with a difficult problem of interpretation of an Agreement and with limited evidence, I cannot find that the second part of the arbitral majority's decision is supportable. That part dealt with the particular remedy which the majority believed to be just and equitable, namely, that USLSA's entire share of the pool revenues as an under-carrier for the year 1982 should not go to it but should instead be distributed to the other carriers. Thus, USLSA's share ($1.2 million) would go 10 percent to Ivarans, 10 percent to the other non-national flag lines according to their respective average pool shares; 40 percent to the Brazilian lines; and the remaining 40 percent to be "distributed in the same proportion and so successively." (Arb. dec. at 64.) According to Ivarans, this works out to a one-sixth share for Ivarans, a one-sixth share for the other third-flag lines, and four-sixths for the Brazilian lines. (Ivarans' Motion for SJ at 32.)

Nobody argued for such a solution to the arbitrators although Ivarans had argued that Moore-McCormack (USLSA's predecessor) should not be given any share because of its deliberate decision to pull out ships and not make its 40 sailings. Even the other respondents, including those who would benefit by receiving portions of USLSA's share, did not argue for such a solution to the arbitrators. (See Reply of USLSA at 5; Lloyd/ELMA Motion to Dismiss at 24 n. 16.) On the contrary, the six respondents had taken the position prior to arbitration that Article 6(a) of the Agreement applied and that the remedy was a reduced share for USLSA's predecessor. (Lloyd/ELMA Motion to Dismiss at 24 n. 16.)

Arbitrator Hearn disagreed strongly with the majority's remedy. (Dec. of Hearn at 12-13.) He found that Moore-McCormack's $1.2 million share should not go to other carriers as an "arbitrary award" when they made no attempt to develop and increase the trade. He commented that "there is no provision in the Pool to support the distribution of the Moore McCormack unearned penalized share" and that such an award to the other carriers would be an "unjust windfall at the expense of Ivarans who provided the sailings to make up the Moore McCormack service reduction." (Id.) He again stated that "nothing in the Pool Agreement provides for the redistribution of the share that would have been earned by Moore McCormack" and called the arbitral majority's remedy a "shotgun justice by imposing an arbitrary redistribution provided for nowhere in the Agreement . . . ." (Dec. of Hearn at 13.) He finished by stating that the arbitral majority's remedy "is completely at odds with both the language and spirit of the Agreement, as well as with the governmental approvals of the Agreement." (Id.)

USLSA argues that the arbitral majority's remedy was incorrect and that the majority had "devised its own formula for a pro rata distribution" of USLSA's share. (Reply of USLSA at 23.) USLSA notes that the arbitral majority acted inconsistently because whereas they found that the Agreement was not to be suspended for 1982 and that Article 6(a) regarding reduced shares should apply rather than Article 6(e) regarding suspension, the arbitral majority then abandoned the Article 6(a) solution (reduced shares) and "devised its own formula . . . ." (Id.) Like Arbitrator Hearn, USLSA notes the absence of any provision in the Agreement supporting such a remedy. (Id.) USLSA argues, therefore, that the original position which it and the other respondents had taken before arbitration was correct and should be enforced, namely, that Ivarans should pay USLSA its share as reduced by Article 6(a) and as was calculated by the pool accountant. (Reply of USLSA at 24.) USLSA also complains about the allocation of costs of the arbitration and about an alleged defect in pool accounting. (Id.)

Ivarans, of course, strongly disagrees with this remedy, arguing that the majority rewrote the Agreement and, instead of suspending the Agreement, "again fell back upon the policy goals of the Government of Brazil," i.e., that Ivarans should pay Brazilian and other carriers although not pay Moore-McCormack. (Ivarans' Motion for SJ at 31.)

Respondents other than USLSA had argued for application of Article 6(a) to the arbitrators. However, now that the arbitral majority's decision has fashioned a different remedy, these respondents seem prepared to live with it. In defending the arbitral majority's decision on all points, these respondents do not argue that their original solution should not apply. In defending the arbitral majority's decision, however, respondent Lloyd in particular seems to be contending that respondents, by following the arbitral award, are not violating law because that award is a routine "interstitial" interpretation of the Agreement rather than a fundamental modification. Therefore, the arbitral award may be followed and the remedy therein need not be filed with the Commission. Many cases are cited in support of this argument, which cases do indeed hold that routine implementations of agreement authority do not require separate filing and did not require separate filing under section 15 of the 1916 Act or its counterpart in the 1984 Act (Section 5.) (Reply of Lloyd at 25-33.)

Earlier in this decision I stated that whether I applied the de novo standard of McDonald, cited above, and considered the arbitral decision as evidence only or whether I applied a limited standard of review of the arbitral award under an "egregious" violation, "manifest disregard of law," arbitrators exceeding their authority, or some similar standard, I would agree with the arbitral majority's decision that the Agreement need not have been suspended. Nevertheless, I applied the McDonald standard. As to the arbitral majority's remedy, I find that even under a limited-review standard, it cannot stand and, a fortiori, would not stand de novo decisionmaking.

As strong as public policy is favoring arbitration, there are limits to that policy. As I discussed in the many cases cited earlier, a court will set aside an arbitral award if arbitrators exceeded their powers or if the award is in manifest disregard of the law, compels violations of law or conduct contrary to public policy, or if the award does not 'draw its essence" from the contract. As the Supreme Court stated in Alexander, cited above, 415 U.S. at 53, quoting from an earlier decision: "An arbitrator is confined to the interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." As the Court had explained, an arbitrator is supposed to determine the intent of the parties and effectuate that intent. (Id.) Thus, whenever an arbitrator deviates from that role and creates his own solutions or modifies agreements, his award cannot stand, as the many cases cited earlier show. See, e.g., Swift Industries, Inc. v. Botany Industries, Inc., cited earlier, 466 F.2d at 1131-1134; Storer Broadcasting Co. v. American Federation of Television & Radio Artists, cited earlier, 600 F.2d at 47-48; see also HMC Management Corp. v. Carpenters Dist. Council, 750 F.2d 1302, 1304-1305 (5th Cir.) rehearing denied, 759 F.2d 489 (5th Cir. 1985) (arbitrator's award set aside because it created remedy not provided in contract and was based on arbitrator's own sense of what was improper behavior); Detroit Coil v. Intern. Ass'n of M. & A. Workers, etc., 594 F.2d 575, 579 (6th Cir. 1979) (arbitrator "is without authority to disregard or modify plain and unambiguous provisions;" if arbitrator deviates from contract, his award "must find support in the contract itself or in prior practices demonstrating relaxation of the literal language."); W.R. Grace and Co. v. Local Union No. 759, 652 F.2d 1248, 1257 (5th Cir. 1981) (arbitral award based on "fairness" and "equity" but not on contract provisions set aside); Grand Rapids Die Casting v. Labor Union No. 159, 684 F.2d 413 (6th Cir. 1982) (arbitrator improperly substituted his own solution for those agreed upon by the parties).

The arbitral majority's remedy provides an obvious example of arbitrators exceeding their authority and substituting their own solution for that agreed upon by the parties. As USLSA noted, the arbitral majority found that Article 6(a), which did not provide for suspension, should be preferred over Article 6(e), which required suspension, because suspending the Agreement under the circumstances of the case would be contrary to the intent of the parties. However, having so concluded, the arbitral majority then proceeded to discard the very remedy set forth in Article 6(a), namely, a proportionate reduction in shares for a carrier failing to maintain its minimum requirement of sailings and instead "devised its own formula," although there is nothing in the Agreement authorizing such a solution. (Reply of USLSA at 23.)

Analysis of the arbitral majority's decision to formulate its unsolicited remedy shows that the majority acted in response to Ivarans' arguments that it would be unfair to make payment to Moore-McCormack which had deliberately reduced its sailings in 1982 (although even Ivarans had not argued for the particular solution devised by the arbitral majority.) The arbitral majority invoked "general principles of contract law" and "the general principle of law and equity" and found that Moore-McCormack's conduct was "a much more serious infringement of the contract" because of its "deliberate decision not to perform a fundamental obligation of the Agreement, defined in Article 1(c)." (Arb. dec. at 60-61.) In effect, the arbitral majority found that Moore-McCormack had breached the contract not only because Moore-McCormack failed to make the minimum number of sailings required. The arbitral majority recognized that such a failure standing alone would not constitute a breach under Article 5(h) and would be remedied by the reduced-shares penalties in Article 6(a). (Arb. Dec. at 61.) However, the arbitral majority found that Moore-McCormack's failure to make these sailings "expresses the deliberate decision not to perform a fundamental obligation of the Agreement, defined in its Article 1(c)." (Id.) This fundamental obligation found in Article 1(c) was that "the

Lines will actively and aggressively compete for all available cargo . . . and promote and develop, the best of their abilities, the commerce between Brazil and the Atlantic ports of the U.S.A. . . ." (Id.) The arbitral majority points out how important service and minimum-sailings requirements were to the Commission when the Commission approved Agreement No. 10 on December 30, 1980, and how important the minimum-sailings requirement was to the carriers' incentives. (Arb. dec. at 62.) Consequently, the arbitral majority agreed with Ivarans that because of Moore-McCormack's deliberate decision to remove ships and reconstruct them, that line was "in effect asking Ivaran to pay for the expansion of Moore-McCormack's fleet . . . ." (Arb. dec. at 62.) This was "never a purpose of the pool" and would result in "unjust enrichment" for Moore-McCormack if that line were to receive its share as an under-carrier for the year 1982. (Arb. dec. at 63.) Accordingly, the arbitral majority came up with their own remedy, namely, that Moore-McCormack's (now USLSA's) entire share ($1.2 million) would be distributed to the other carriers and Ivarans would make its pool payment on that basis. (Arb. dec. at 64.)

There are a number of problems with this part of the arbitral majority's decision. Essentially, as the many cited cases continually hold, arbitrators are not supposed to "dispense their own brand of industrial justice," or create new remedies based on "fairness" or "equity" which are not authorized by the contract. Instead, an arbitrator's award is supposed to "draw its essence from the [contract]" and the award cannot be in "manifest disregard thereof." See, e.g., Swift Industries, Inc. v. Botany Industries, Inc., cited above, 466 F.2d at 1130, 1134. Nor can the arbitrator change the nature of the claim itself. Id. In the instant case, a claim was brought by six carriers that Ivarans had made a "wrongful unilateral declaration of suspension" and had refused "to acknowledge the final 1982 Pool Statement as issued by the Pool Accountant. . . ." (Arb. dec. at 7.) Nobody, not even Ivarans, had argued to the arbitrators that the Agreement should not be suspended but that Ivarans should pay one under-carrier's (Moore-McCormack's) entire share to the other carriers. Furthermore, the Agreement does not provide that a failure to make the minimum number of required sailings constitutes a breach. It specifically provides that such failure "shall not constitute a breach" but "will be subject to provision (sic) of Article 6." (Agreement, Article 5(h).) Also, the Agreement provides for several specific remedies in Articles 6, 7, and 10. As seen, if a carrier fails to maintain its minimum number of required sailings, and if this failure does not cause inadequate service, the remedy is that such carrier shall lose a proportionate share of pool revenues. (Article 6(a).) In the event of a serious disruption of service by major carriers or a major combination of carriers, as seen, Article 6(e) provides for a suspension of the Agreement until "adequate service is again restored." If a carrier fails to earn revenue equal to a certain percentage of its pool share, that carrier is penalized and "undercarriage forfeitures" are imposed by which a certain proportion of the carrier's share will be forfeited and distributed to the other carriers. (Article 7(c); Reply of USLSA at 16, 22.) Finally, if a carrier "terminates its activities in this trade without transferring its business to a successor, the share of this party will be divided amongst the remaining parties of their respective group where the termination occurred in proportion to their shares." (Article 10(b), Appendix to Ivarans' Motion for SJ at 16.)

The parties have therefore provided for all the contingencies that might occur and have provided for specific remedies in each event. In this case, if Moore-McCormack failed to maintain its minimum number of sailings, it would suffer a reduced share of pool revenues under Article 6(a). If it failed to compete aggressively and actively for cargo in a particular year and, consequently, its earned revenues declined for that year, it could suffer an "undercarriage forfeiture" under Article 7(c), and a portion of its share could be distributed to all other carriers.

As the many cases cited previously show, arbitrators are supposed to derive their authority from the contract which they are interpreting and carrying out. However, nowhere in the subject Agreement does it provide that if a carrier fails to make its minimum number of required sailings, that carrier has breached the Agreement and the penalty is to take its entire share of pool revenues and give that share to all the other carriers. The closest penalty which the Agreement provides is to take a carrier's share and distribute it to other carriers in its own group but this penalty is reserved for cases in which the carrier "terminates its activities" under Article 10(b). A limited portion of the carrier's pool share may be distributed to all other carriers regardless of group under Article 7(c) but that occurs only when the carrier's earned revenues fail to reach a certain specified level compared to its allocated pool share.

The arbitral majority in no way suggested that Moore-McCormack had "terminated its activities" in 1982 nor did the majority make any reference whatsoever to Moore-McCormack's earned revenues for the year 1982 or to possible "undercarriage forfeitures" because of decline in such revenues. Instead, the arbitral majority found that Moore-McCormack had breached the Agreement (even though Article 5(h) said that it had not) and, ignoring the specific remedy which the Agreement did provide under the circumstances (reduced pool share under Article 6(a)), created a new remedy for when a carrier missed six out of 40 required sailings that was even more drastic than if the carrier had terminated its services altogether in the trade without arranging for a successor carrier. This solution obviously does not "draw its essence from the Agreement" but, on the contrary, is in manifest disregard of the Agreement. Even under the narrow standards of review prevailing under arbitration law, such a solution would not be enforceable. However, in the context of the Shipping Act and the Commission's responsibility to ensure that parties adhere to the terms of their Agreements and the fact that only the Commission, not arbitrators, is authorized to disapprove, cancel, or modify filed Agreements, it is clear that the parties cannot lawfully implement the arbitral majority's remedy. That is because, in effect, the arbitral majority, in creating this new remedy, has modified the existing Agreement, and if the parties were to carry out such a modification, they would be in violation of sections 10(a)(2) and (3) of the 1984 Act.

The arbitral majority's award is invalid and cannot be implemented as a matter of law. However, even if it is argued that the award is just and reasonable and should somehow be enforced for those reasons, the argument is of doubtful validity. The award purportedly attempts to avoid the "unjust enrichment" of Moore-McCormack and avoid making Ivarans having to "pay for the expansion of Moore-McCormack's fleet." However, support for these arbitral conclusions is questionable at the very least if one considers a few salient facts.

As I have previously mentioned, Ivarans was a heavy over-carrier in 1981 (paying over $1 million for that year) even though Moore-McCormack had made 47 sailings in that year, 14 more than in 1982. Furthermore, carriers reduced sailings overall from 198 in 1981 to 181 in 1982, and Ivarans reduced its sailings from 29 to 25. These facts suggest that Ivarans may have been an over-carrier in 1982 for reasons other than the number of Moore-McCormack's sailings and that Ivarans and other carriers may have reduced their number of sailings in 1982 for valid business reasons, not because they deliberately decided not to compete aggressively and actively for cargo.

As noted earlier, had Moore-McCormack made its 40 sailings in 1982, Ivarans would not have complained about its being an over-carrier. However, Ivarans did not become aware that Moore-McCormack would not meet its sailings requirement until October of 1982 (although, as USLSA alleges, Ivarans could possibly have been aware that it would be an over-carrier by July of 1982). However, as in any pool, some carriers are over-carriers and some are under-carriers. How can one be so certain, therefore, that an under-carrier such as Moore-McCormack would be "unjustly enriched" or that over-carriers are subsidizing under-carriers? This is especially so when one considers that, as parties can do when formulating pooling agreements, the parties here have provided against the possibility that one carrier or another may not "aggressively compete" for cargo and that such sluggish carrier may be "unjustly enriched." They have done that in this Agreement by providing for "undercarriage forfeitures" in Article 7(c) and for reduced shares in Article 6(a). With no finding of facts concerning the quality of service provided by Moore-McCormack or any carrier member of the Agreement, no facts showing that Moore-McCormack failed to meets its minimum-port-call requirements under the Agreement or to earn sufficient revenues so as to avoid undercarriage forfeitures, no facts showing how aggressively or actively any carrier was or was not competing other than numbers of sailings made in 1982, and with facts showing that other carriers including Ivarans reduced sailings in 1982, how can the arbitrators be so certain that Ivarans would "unjustly enrich" Moore-McCormack and would be "paying for the expansion of Moore-McCormack's fleet" if Ivarans is required to pay Moore-McCormack a reduced share, the penalty provided by Article 6(a)?[23]

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[23] Ivarans had argued before the arbitrators regarding shippers' complaints about service and reduction of service and action by the Brazilian government canceling a conference monopoly, presumably because of a service problem. (Arb. dec. at 25, 31.) Respondents had argued that there was no deficiency of service because the overall required number of sailings under the Agreement was met in 1982. (Arb. dec. at 30.) The arbitral majority, in deciding that Article 6(a) regarding suspension did not apply, in effect, held that, under the facts shown, there was "adequate maritime transportation to the trade" and "adequate service" because the national-flag lines had made up the sailings deficiency of Moore-McCormack. (Arb. dec. at 57-58.) Nevertheless, and somewhat inconsistently, when the arbitral majority formulated their own remedy, they seemed concerned that Moore-McCormack had not "actively and aggressively competed" for cargo and that such conduct contradicted the fundamental purpose of the Agreement to provide a guarantee of service." (Continued on following page.)

If there is something wrong with the Article 6(a) penalty or with the Agreement otherwise because it is operating in a manner which violates something in the 1984 Act and should therefore be disapproved, canceled, or modified under section 11(c) of the 1984 Act, that is a matter to be decided in the proper proceeding seeking to determine such questions. It is, however, beyond the scope of a proceeding which seeks to determine whether the parties have acted or will act outside the scope of the authority granted in their Agreement because of a failure to suspend the Agreement for the year 1982 and a belief that one carrier owes other carriers money for that year.

For the foregoing reasons, I conclude that the remedy devised by the arbitral majority (taking USLSA's entire share for 1982 and distributing it to the other carriers) is not a remedy authorized by the Agreement and that respondent's original arguments to the arbitrators (urging application of Article 6(a) to reduce USLSA's pool share for 1982) were correct arguments because Article 6(a) provides the remedy agreed upon by the parties originally and approved by the Commission. Should that remedy not be implemented in the future or the arbitral majority's or someone else's remedy be implemented, any injured or

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[23] (Continued from preceding page.)
(Arb. dec. at 58-64.) The Agreement treats the service question in terms of 108 overall, required sailings and not in terms of extraneous facts concerning particular service requirements of shippers. If a carrier or shippers are disadvantaged because of the Agreement's operations and the Agreement is to blame and should be modified or canceled, such a question is outside the scope of this limited proceeding.

adversely affected party can file a complaint or petition with the Commission seeking appropriate relief.[24]

The Question Whether Respondents Have Violated the Act

No party disputes the fact that the Agreement was not suspended in 1982 nor the fact that the Agreement has continued in operation during the pool periods 1983, 1984, and 1985. (See, e.g., Lloyd/ELMA Motion to Dismiss at 23; 25 n. 17.) In fact, as two respondents acknowledge (Lloyd/ELMA Motion to Dismiss at 25 n. 17):

> In accordance with the parties' determinations at the pool meetings that the Agreement had not been inadvertently suspended, the pool accounts were directed on January 25, 1983 to proceed to issue a final pool statement for 1982.

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[24] As I have noted, USLSA has also argued that the arbitral majority incorrectly ordered USLSA to bear the majority of the costs of the arbitration although USLSA states that it was not the primary losing party and that the arbitral majority committed an accounting error. (Reply of USLSA at 24 and 24 n. 9; Arb. dec. at 63.) Whatever the merit of these claims, the other parties have not had an opportunity to reply to them and neither the record nor the briefing on such points is adequate. This case, after all, is a complaint case brought by Ivarans, not by USLSA, nor is it a petition for declaratory order. If USLSA's claims remain unsatisfied, USLSA can seek relief in a proper complaint proceeding or perhaps by petitioning for a declaratory order under Rule 68, 46 CFR 502.68. In situations in which money may be owed and parties are not certain as to how they should proceed under the law or how much should be paid, declaratory-order proceedings are especially appropriate. See, e.g., Virginia Port Authority (Petition for Declaratory Order), 21 SRR 199 (1981), affirmed without opinion under the name Portsmouth Terminals, Inc. v. F.M.C., No. 81-2374 (D.C. Cir. November 9, 1982) In the Matter of Rates Applicable to Ocean Shipments via APL, 21 SRR 1168 (1982); Application of PWC for Benefit of Shintech, 21 SRR 1361, 1366-1367 (I.D.); 21 SRR 1441, Notice of Withdrawal of Application and Termination of Proceeding; F.M.C. notice of finality, January 24, 1983.) This observation also applies to Ivarans' dispute over the correct amount of money owed under the arbitral award. (See Ivarans' Motion for SJ at 33 n. 23.)

Of course, since that time, the parties have proceeded to arbitration, have obtained an arbitral decision and award, and Ivarans (as well as all pool members) has been sent two letters from the Conference Administrator as a followup to that award.[25]

Respondents argue that everything they have done is authorized by the Agreement and, indeed, is required by the Agreement. As one respondent (Lloyd) states: (Reply of Lloyd to Motion for SJ at 23-24):

> Here the evidence is that Respondents have at all times conducted themselves under the approved agreements. They arbitrated a dispute as required, they accepted the arbitrators' decision as final, as required, and they received pool accountants statements, as required. (Emphasis in the original.)

See also Reply of USLSA at 10 (". . . no violations of the Acts can be demonstrated when the parties simply seek to enforce a properly rendered arbitration decision.")

If Ivarans were correct and the Agreement should have been suspended for the year 1982 (or until adequate service was restored), one might argue that respondents had acted outside of their authority by continuing operations and by instructing the pool accountants to proceed to issue a final pool statement for 1982. However, Ivarans' contentions are not correct. Furthermore, even if they were correct, it is

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[25] Ivarans contends that respondents have also commenced action to collect payments under the arbitral award in Brazil. (Ivarans' Motion for SJ at 77.) However, I have no evidence before me on this question. Respondents deny the allegation and state that all that has happened is that the arbitrators have sought to register their award with the Brazilian courts, as provided by IACAC rules and Brazilian law, not to collect payment. (Lloyd Reply to Motion for SJ at 23 n. 19, citing prehearing transcript at 52-53.)

problematic whether respondents can be found to have violated law when they followed their Agreement's procedures to the letter. In other words, it would be bizarre indeed for the Commission to find that parties, who followed the procedures required by their approved Agreement in cases of dispute, acted outside their authority, and in the past the Commission has not done such a thing. See Boston Shipping Association v. Port of Boston Marine Terminal Association, 11 F.M.C. 1, 6-7 (1987) (party following procedures set forth in approved agreement found to have acted properly); cf. Firestone International Co. v. F.E.C., cited above, 9 F.M.C. at 127 (good-faith assertion of contract rights not improper).

There is no basis in the present record, therefore, to find that respondents have violated sections 10(a)(2) or (3) of the 1984 Act or that they have violated the Commission's Order of Conditional Approval of December 30, 1980, and, consequently, section 32(c) of the 1916 Act. By following the very procedures mandated by their Agreement up to now, respondents cannot be found to be operating outside the scope of their authority. Furthermore, because the Agreement was not intended to be suspended under the facts that occurred in 1982, there was no modification to that Agreement which was created by respondents' continuation of that Agreement in 1982 and thereafter.

A problem could arise if the Commission agrees with this Initial Decision and if, thereafter, respondents attempt to implement the remedy devised by the arbitral majority. Such behavior by respondents could ripen into violations of section 10(a)(2) or (3) because, then, there would be evidence that respondents were operating an Agreement different from the one filed with the Commission, as interpreted by the Commission. If such were to happen, any party can file an appropriate complaint or petition and ask for appropriate orders. On the other hand, should the matters remain where they are now, i.e., with the Article 6(a) remedy being unimplemented, any party can seek relief in the proper case. One would hope, however, that if the Commission speaks clearly as to the correctness of the Article 6(a) remedy, the parties would proceed to follow that decision and that no one would have to seek further relief before the Commission.[26]

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[26] Ivarans argues that the Commission has ample authority to issue a cease-and-desist order to prevent the implementation of an unapproved agreement and cites case authority. (Ivarans' Motion for SJ at 76-79.) I do not necessarily disagree, but I find issuance of such an order to be premature at this time. Ivarans has shown no violation of law by respondents at this time and not even the likelihood of such violation. Even an order that respondents not carry out the unauthorized remedy of the arbitral majority would be premature even if it could be issued as a matter of law. That is because respondents themselves had argued before the arbitrators in favor of the very remedy which this Initial Decision finds to be the only lawful one, i.e., reduced share for USLSA under Article 6(a). There is, therefore, no reason to assume that once the Commission speaks on this matter, respondents would refuse to carry out the Article 6(a) remedy. Even if Ivarans were to resist the remedy, an order at this time directing respondents to carry out the remedy would not change such a situation. In reality, if it were not for the allegations of violations, this case would, in substance, have been a declaratory-order proceeding in which, as I mentioned earlier, the parties would be asking how they are supposed to proceed under their Agreement and how much money is to be paid to whom. See, e.g., Virginia Ports Authority, cited above, 21 SRR 199. Had this case been developed in the form of a Rule 68 declaratory-order proceeding, furthermore, it might have been possible to resolve USLSA's claims as to its share of the arbitration costs and the alleged arbitral accounting error, which matters were raised by USLSA in its reply pleading and were consequently unanswered.

Consequences of Respondent USLSA's Petition for Reorganization

On November 24, 1986, respondent USLSA together with its parent company (McLean Industries, Inc.) and another subsidiary company of that parent (United States Lines, Inc.) petitioned for reorganization under Chapter 11 of the Bankruptcy Code. The petition was filed in the Southern District for New York. (See Journal of Commerce, November 25 & 26, 1986.) If so, the filing of that petition has consequences for this proceeding which must be considered.

The filing of a petition under the Bankruptcy Code, first of all, automatically stays all proceedings at any stage "against the debtor" (i.e., USLSA) regardless of who appears to be the prevailing party. See 11 U.S.C.S. sec. 362(a)(1); Assoc. of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446 (3rd Cir. 1982). However, this does not mean that the stay cannot be lifted. The law provides that a party in interest may request the bankruptcy court to grant relief from the stay for cause. See 11 U.S.C.S. sec. 362(d). The legislative history indicates that a stay will "undoubtedly" be granted to permit a specialized tribunal to bring a proceeding to a conclusion in order to relieve the bankruptcy judge of additional burdens and for other reasons. See House Judiciary Report, quoted at page 260, following 11 U.S.C. sec. 362; see also discussion in Docket No. 81-47, TAFE v. Waterman Steamship Corp. and Cosmos Shipping Co., Inc., Order, January 20, 1984 (unreported), at 10-12.

There are, however, six other parties to this proceeding besides USLSA who are awaiting a decision as to what they should do under their Agreement, among other things. The Administrative Procedure Act

(5 U.S.C. sec. 555(b)) provides that parties are entitled to a decision "within a reasonable time." The Commission, acting pursuant to the Shipping Act of 1984 (section 11(d)) has instructed me, furthermore, to issue my decision by March 5, 1987. Under these circumstances, it would not serve any purpose to delay issuance of my decision for probably years to await the conclusion of the USLSA reorganization proceeding.[27] Furthermore, if the Commission were to adopt this decision, USLSA would not be liable to pay anything. On the contrary, it would be entitled to receive over $1 million from Ivarans. It would appear, therefore, to be in USLSA's interest for this proceeding to continue and for USLSA to seek to lift the stay. Alternatively, if the Commission concludes that Ivarans' case has merit, this would mean that respondents would not be allowed to recover any money from Ivarans for 1982, not that USLSA would owe anything.

Nevertheless, because of the automatic stay provisions of 11 U.S.C.S. sec. 352(a), it would appear that this proceeding cannot move forward in the usual fashion under the procedure set forth in Rule 227, 46 CFR 502.227. If all parties are subject to the stay provisions, not just USLSA, then the parties cannot be required to file exceptions or replies to exceptions until the stay is lifted or the bankruptcy proceedings conclude. If the stay applies only as to USLSA, this would mean that USLSA, which has a position that is different from

[27] In several cases involving Waterman Steamship Corporation, the proceedings were held up for over two and one-half years pending conclusion of the Waterman bankruptcy proceeding. See Docket No. 81-57, cited above, which is still under a stay because the second respondent, Cosmos, has also filed for reorganization.

any other party, would apparently be unable to participate and protect its position and would therefore be prejudiced.

Under the circumstances it would appear desirable for the Commission to suspend the normal Rule 227 procedure to allow USLSA (or any party) to ask the bankruptcy court to lift the stay pursuant to 11 U.S.C.S. sec. 362(d), and to resume the normal procedure after the stay is lifted or, if it is not lifted, after the bankruptcy proceedings conclude. See Union Carbide Corp. - Battery Division v. Waterman Steamship Corp., Order, 22 SRR 1517 (1984) (Commission acted after settlement officer's ruling and stayed the proceeding until complainant could obtain a waiver of the stay or the bankruptcy proceeding could be completed.)[28]

Ultimate Conclusions

Complainant Ivarans, a party to a pooling Agreement first approved by the Commission in 1972, alleges that the other six parties to the Agreement have violated or are violating law by refusing to suspend the Agreement for the year 1982 and by attempting to recover over a million dollars from Ivarans under an arbitral award. Ivarans claims that

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[28] In order to avoid the lengthy delay that occurred in Docket No. 81-57, cited earlier, USLSA (or any party) should be advised that the complainant in that case, although filing a motion with the bankruptcy court asking that the stay be lifted, failed to follow bankruptcy court rules and did not ask for a hearing on the motion. Accordingly, the bankruptcy judge never ruled on the complainant's motion and its case before the Commission was stayed for over two and one-half years awaiting conclusion of the bankruptcy proceeding. See Local Bankruptcy Rule 44(a), Southern District of N.Y., effective April 21, 1986.

because USLSA (formerly Moore-McCormack) failed to maintain 40 sailings in 1982, the Agreement literally required that the pool be suspended for that entire year. Ivarans also claims that the arbitral decision not to suspend constitutes a modification of the Agreement that should have been filed and that respondents, by not filing it, have violated the Commission's Order of Conditional Approval of December 30, 1980.

Respondents move to dismiss the complaint on a number of preliminary jurisdictional grounds. They claim that Ivarans' claims are time-barred by statutes of limitation, or by doctrines of laches, estoppel, or waiver, and that the Commission should not or cannot disturb the decision of arbitrators obtained under the authority of the Agreement itself. They also claim on the merits that Ivarans has not shown that they have violated law and that all of their actions so far have been specifically authorized by the Agreement.

I conclude that none of respondents' preliminary arguments as to time bars, estoppel, etc., and the binding effect of an arbitral decision are valid and that the Commission cannot be ousted from exercising its jurisdiction to determine the scope of approved agreements merely because of an arbitral decision. Ivarans' complaint, although referring to "reparations," cannot actually be seeking reparations because Ivarans has not yet paid any money under the arbitral award. Consequently, the statute of limitation has not yet begun to run. There is also no basis to find that Ivarans was guilty of inexcusable delay in filing its complaint or that respondents have suffered prejudice by any such delay or that Ivarans misled respondents or waived its rights to seek relief under the Shipping Act of 1984.

The most important preliminary question is to determine what is the responsibility of the Commission in a case in which complainant alleges violations of the Shipping Act but in which the matter has proceeded to arbitration under an approved agreement and the arbitrators have ruled against complainant. Arguably, the Commission could take action ranging from de novo decisionmaking with due consideration to the arbitral decision as evidence or to very limited review of that decision. Considerable case law indicates that when a statute provides for independent rights and remedies which courts or agencies can determine, the court or agency has the responsibility of hearing the case and determining the issues notwithstanding a previous arbitral decision which dealt with the same dispute. The Commission has indicated in the past that it will not defer to arbitral decisions especially when the issue concerns a determination of the scope of authority under approved agreements which are not merely private contracts.

In the present case, under any reasonable standard, the record shows that the arbitral majority was correct in finding that the Agreement did not have to be suspended for the year 1982. However, the arbitral majority's particular remedy is not authorized by the Agreement, and, consequently, respondents cannot seek its enforcement without violating the Shipping Act.

The arbitral majority's decision that the Agreement, although containing some ambiguities, did not have to be suspended is well reasoned and is based on principles of contract interpretation followed both under Brazilian and American law. Following these principles, the arbitral majority determined the parties' intentions, favored the effectuation of the contract, and interpreted its language as a whole in the light of its purpose. Essentially, the majority concluded that the parties did not intend that the entire Agreement be suspended merely because a major carrier (Moore-McCormack) failed to make five or six of its 40 required sailings in 1982 when, furthermore, other carriers made up the sailings deficiency and carried out a basic purpose of the Agreement, to allocate revenues on a 80-percent-to-20-percent basis between national-flag and non-national-flag groups of carriers. Suspension was intended, according to the arbitral majority, in serious situations of overall disruptions of service.

The arbitral majority's decision in this regard is persuasive and is supported by other reasons regarding the Commission's intentions in approving the Agreement, such intentions being relevant under case law but which were not considered by the arbitral majority. Under the facts of this case, namely, failure by Moore-McCormack to make its 40 sailings in 1982 although overall more than the minimum number of sailings was provided and absent evidence showing that Ivarans had become an over-carrier because of Moore-McCormack's deficiency or had operated any differently as a result, suspension makes no sense and could not have been intended by the parties or the Commission. Even three of the four carriers who were over-carriers for 1982 (except for Ivarans) did not argue in favor of suspension for that year. Ivarans' narrow, literal reading of a portion of Article 6(e) leads to absurd results and would allow the Agreement, which was approved by the Commission because of its benefits to the trade, to be toppled for the entire year 1982 even if Moore-McCormack had missed one sailing in December. The Commission could not have intended such a result, especially when the Agreement provides a specific remedy (reduced shares) for exactly what happened.

Although the aribtral majority's reasoning was persuasive regarding the question of suspension of the Agreement, the particular remedy which it devised (taking Moore-McCormack's entire pool share for 1982 and distributing it to the other carriers) is nowhere authorized by the Agreement and is consequently not valid even under the limited-review standard in arbitration law. In devising their own remedy. the arbitral majority found a breach of the Agreement by Moore-McCormack although the Agreement specifically stated no breach under the circumstances, and, ignoring the specific remedy which the Agreement did provide for what actually happened, the arbitral majority created a remedy against a carrier missing six out of 40 sailings, which remedy was even more drastic than if the carrier had terminated its services altogether. This arbitral remedy does not draw its essence from the Agreement and is in manifest disregard thereof and, even as an attempt to be fair and just, rests on a questionable factual foundation. Furthermore, the remedy modifies the Agreement and would require parties to act in violation of the Agreement's terms and, consequently, in violation of sections 10(a)(2) and (3) of the 1984 Act. No party had argued for such a remedy before the arbitrator.

There is no evidence that respondents have violated law at this time. Instead, respondents have followed the procedures set forth in their Agreement requiring arbitration of disputes. Should respondents attempt to enforce the unauthorized arbitral remedy, however, their conduct could ripen into unlawful activity because that remedy is not authorized by the Agreement. If that were to happen or if the remedy set forth in Article 6(a) continues to be ignored and unimplemented, an aggrieved party can seek relief before the Commission in an appropriate proceeding. However, a clear statement by the Commission on the applicability of Article 6(a) should, one would hope, suffice to prevent subsequent litigation.

Because respondent USLSA has filed for reorganization under the Bankruptcy Code, it would be appropriate for the Commission to suspend the remaining schedule under Rule 227 to allow USLSA or any party to ask the bankruptcy judge to lift the statutory stay of this proceeding or to await conclusion of the bankruptcy proceeding.

Norman D. Kline

Norman D. Kline
Administrative Law Judge

Washington, D.C.
November 28, 1986

(S E R V E D)
(December 22, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-9

A/S IVARANS REDERI

v.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO, ET AL.

Initial Decision adopted with clarifications. Evidence presented to arbitrators which was also of record in Commission proceeding, but not arbitrators' decision itself, used as evidence in reaching Commission decision.

Interpretation of Pooling Agreement finding Agreement not automatically suspended upon failure of major carrier to make required 40 sailings in 1982 held in accord with parties' intentions and Commission's intention in approving Agreement.

Actions to date by respondents with respect to their interpretation of Agreement and arbitrators' award not violative of Shipping Acts or Commission orders.

Order Denying Stay of proceeding reaffirmed.

Complaint dismissed.

Appearances as below, except for the following:

David R. Kay for respondents ELMA and Bottacchi.
Neal M. Mayer and Paul D. Coleman for respondent Netumar.

REPORT AND ORDER ADOPTING INITIAL DECISION WITH CLARIFICATIONS

BY THE COMMISSION: (Elaine L. Chao, Chairman; James J. Carey, Vice Chairman; Francis J. Ivancie and Edward J. Philbin, Commissioners)

This proceeding is before the Commission on Exceptions and Replies to Exceptions to the Initial Decision ("I.D.") of Administrative Law Judge Norman D. Kline ("Presiding Officer" or "ALJ"). The proceeding was initiated upon the complaint of A/S Ivarans Rederi ("Ivarans"), a party to Agreement No. 10027, a cargo revenue pooling agreement in the Northbound Brazil/U.S. Atlantic Coast trade ("Agreement"), against the other six carrier members of the Agreement.[1] The ultimate issue raised by the complaint is whether the Agreement required that it be automatically suspended when a major carrier, Moore-McCormack Lines, Inc. ("Moore-McCormack"), the corporate predecessor of United States Lines (S.A.) Inc. ("USLSA"), a respondent in this proceeding, failed to make the required 40 sailings in 1982. Ivarans contends that the Agreement requires this interpretation and that the other parties to the Agreement were engaging in actions unauthorized by the Agreement and thus contrary to sections 10(a)(2) and 10(a)(3) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. §§ 1709(a)(2), (3), in attempting to impose a contrary interpretation based in part upon the award of an

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[1] The six Respondents are: Companhia de Navegacao Lloyd Brasileiro; Companhia de Navegacao Maritime Netumar; Empresa Lineas Maritimas Argentinas S.A.; A. Bottachi S.A. de Navegacion C.F.I.I.; Van Nievelt Goudriaan and Co., B.V. ("Hopal"); and United States Lines (S.A.) Inc. The first four of these will be referred to hereinafter as the "Argentinean and Brazilian carriers." A default order has been issued against Hopal for its failure to participate in any way in this proceeding. <u>See</u> Initial Decision, 7, n. 4, and <u>Motion for Sanctions Granted in Part</u>, August 5, 1986.

arbitration panel in Brazil.[2] Ivarans also alleges that carrying out the Agreement in this fashion was contrary to the Commission's 1980 Order of Conditional Approval ("1980 Order") of Agreement No. 10027-10, an amendment of the Agreement ("Amendment 10"), and thus violates section 32(c) of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. § 831(c) (1982), which imposes penalties for violation of Commission orders.

In his I.D. issued on December 3, 1986, the ALJ rejected Ivarans' interpretation of the Agreement. In determining the scope of the Agreement as approved by the Commission, he considered the arbitral decision along with other evidence of the intent of the parties and evidence of the intent of the Commission. The Presiding Officer held that the Agreement was not suspended because Moore-McCormack failed to make its required number of sailings for 1982, a conclusion consistent with what the arbitrators had found. He further determined, however, that the remedy devised by the arbitral panel was unauthorized and contrary to the

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[2] The arbitration panel had found that the Agreement was not suspended when USLSA failed to meet its requirement of 40 sailings, but required only the adjustment of pool shares as a penalty. In imposing such penalty, however, the arbitration panel ruled that when Ivarans made payment to the other pool members, which it was required to make as an overcarrier, Ivarans should pay USLSA's share ($1.2 million) of the overcarriage payment to the other parties (including itself) on a pro-rata basis. A dissenting member of the arbitration panel agreed with Ivarans that the Agreement should have been suspended for the year 1982 and further concluded that, even if the Agreement were not suspended, the remedy devised by the arbitral majority was unauthorized by the Agreement.

express remedy provided in the Agreement, which he found permits only a reduced share of the pool payments by those failing to meet their sailing requirements and possible "undercarriage forfeitures."

The Presiding Officer recommended that the Commission suspend the time for the filing of Exceptions and Commission review because of USLSA's bankruptcy and the automatic stay provisions of the Bankruptcy Code.[3] The Commission, by order served December 18, 1986, stayed this proceeding until further notice.

On March 4, 1988, counsel for USLSA submitted to the Commission an order issued by the United States Bankruptcy Judge which lifted the automatic stay "for the limited purpose of allowing . . . [Docket No. 86-9] to continue to judgment . . . ." The Commission thereupon established a new schedule for the filing of exceptions to the I.D. and replies thereto. In accordance with this schedule, Ivarans has filed its Exceptions and USLSA and the Argentinean and Brazilian carriers have filed Replies to Ivarans' Exceptions.

THE AGREEMENT

The relevant sections of the Agreement dealing with sailing obligations, penalties, and Agreement suspension provided:

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[3] USLSA filed for reorganization under Chapter 11 of the Bankruptcy Code on November 24, 1986.

ARTICLE 5

MINIMUM SAILINGS AND CARGO CAPACITY

a) The parties will maintain a minimum of freighter sailings per pool period, as defined in Article 9 hereof, from ports of Brazil to U.S. Atlantic ports as established in Article 1, as follows:

National Flag Lines:

Lloyd) Netumar) Moore-McCormack)	80 sailings

Non-National Flag Lines:

E.L.M.A.	12 sailings
Ivarans	15 sailings
Hopal	6 sailings

* * *

g) [later renumbered 5(h)] It is understood that a party's failure to make the minimum sailings specified in this Agreement shall not constitute a breach of same but will be subject to provisions of Article 6.

ARTICLE 6

SAILING DEFICIENCY

a) In the event that a party shall fail to maintain the minimum number of sailings per pool period as specified in Article 5 hereof, with the exceptions provided in Article 11, then the pool share of such party shall for the applicable accounting period be reduced in direct proportion and the share of the other party(s) within the National Flag or the Non-National Flag category where the deficiency occurs shall be increased by the same amount, proportionally to their respective shares.

* * *

c) [later renumbered 6(e)] In the event that any party or combination of parties exceeding 1/3rd of the total pool share for reasons of their own or in accordance with Article 11 do not provide minimum number of sailings in accordance with Article 5 or are unable to provide sufficient space for cargo covered by this pooling Agreement, the pool to be suspended for such duration and the pool to be resumed only when adequate service is again restored.

ARTICLE 7

CALCULATION OF REVENUES FROM POOLED CARGO

* * *

c) . . .

(VI) Undercarriage Forfeitures

For the settlement of revenue derived from the carriage of pooled cargo the following forfeitures shall be applied:

1. When a Party's Adjusted Revenue is less than 90 percent but not less than 75 percent of that Party's Pool Share the Party will forfeit 25 percent of the Pool Payment due to that Party correspondent to this difference up to 90 percent of the Party's Pool Share.

2. Additionally, when the Party's Adjusted Revenue is less than 75 percent but not less than 50 percent of the Party's Pool Share the Party will forfeit 50 percent of the Pool Payment due to that Party correspondent to this difference up to 75 percent of the Party's Pool Share.

3. Additionally, when the Party's adjusted Revenue is less than 50 percent of the Party's Pool Share the Party will forfeit 100 percent of the Pool Payment due to that Party correspondent to this difference up to 50 percent of the Party's Pool Share.

4. The above forfeit amounts shall be allocated to the other Part(ies) proportionately to its (their) Pool Contribution.

* * *

ARTICLE 10

CANCELLATION

* * *

b) It is also agreed that if at any time after the execution of this Agreement and during the period thereof, any party signature thereto, terminates its activities in this trade without transferring its business to a successor, the share of this party will be divided amongst the remaining parties in proportion to their shares within the national or non-national flag groups. Any party resigning from this Agreement must give thirty (30) days written notice to each of the parties.

* * *

A R T I C L E 11

SUSPENSION - FORCE MAJEURE

Should any party hereto be unable to provide service in the trade as required by this Agreement due to outbreak of war, restraint of Governments, Princes or People, of any nation or the United States, or Act of God (other than ordinary storms or inclement weather conditions), earthquakes, explosions, fire, strikes, or other industrial disturbances, riots, insurrections, sabotage, blockades, embargoes, epidemics, barratry, or piracy, or due to any other circumstances beyond the control of such party, then the force of this Agreement may be suspended by the parties upon prompt written notice of such party to the other parties, such suspension to continue during the period over which the maintenance of service is affected.

In 1980, Article 5 of the Agreement was modified to read as follows:

A R T I C L E 5

MINIMUM SAILINGS/CALLS AND CARGO CAPACITY

a) The parties will maintain a minimum of direct freighter sailings per pool period, as defined in Article 9 hereof, from ports of Brazil to U.S. Atlantic ports as established in Article 1 as follows:

NATIONAL FLAG LINES		80 SAILINGS
Brazilian Flag:	LLOYD)	
	NETUMAR)	40 sailings

U.S. Flag:	MOOREMACK) SEA-LAND)	40 sailings[4]

NON NATIONAL FLAG LINES — 28 SAILINGS

ELMA) BOTTACCHI)	12 sailings
IVARANS	12 sailings
HOPAL	4 sailings

b) In order to better serve the trade, within the minimum number of sailings fixed in item (a) above, the parties agree to make the following number of direct calls at the principal Brazilian ports, within the range Rio Grande/Recife for each pool period:

NATIONAL FLAG LINES

	(LLOYD - NETUMAR)	(MOOREMACK/) (SEA-LAND)
RIO GRANDE	12	12
PARANAGUA	24	24
SANTOS	36	36
SAO SEBASTIAO	8	8
RIO DE JANEIRO	20	20
ILHEUS	10	10
SALVADOR	10	10
RECIFE	8	8

(*) Porto Alegre, Pelotas, Itajai, Sao Francisco, Angra dos Reis, Vitoria, Maceio:

MOOREMACK/SEA-LAND	LLOYD/NETUMAR
4	4

NON NATIONAL FLAG LINES

	BOTTACCHI/ ELMA	IVARANS	HOPAL
RIO GRANDE	2	2	1
PARANAGUA	4	4	0
SANTOS	6	6	2
RIO DE JANEIRO	2	2	0
ILHEUS	2	2	1

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4 Sea-Land did not in fact enter the trade and assigned its rights, responsibilities, and obligations under the Agreement to Moore-McCormack.

SALVADOR	2	3	1
RECIFE	2	1	0

(*) Porto Alegre, Pelotas, Itajai, Sao Francisco, Sao Sebastiao, Angra dos Reis, Vitoria, Maceio:

BOTTACCHI/ ELMA	IVARANS	HOPAL
2	3	4

* * *

c) For a partial pool period, or when any or all parties are prevented from making their required sailings/calls during the same period of time for any of the reasons set forth in Article 11 hereof, the minimum sailings/calls will be reduced proportionately, for all parties.

d) From time to time the parties may, by mutual agreement, increase or decrease the number of minimum sailings/calls without impairing the adequate service, as expressed in the spirit and preamble of this agreement, filing such changes for approval with the appropriate governmental authorities having jurisdiction.

e) For each of their respective sailings, each party will provide sufficient cargo capacity to satisfy the needs of the trade covered by this Agreement.

THE INITIAL DECISION

As a threshold matter, the ALJ held that the Commission should not dismiss Ivarans' complaint on the basis of statutes of limitation, or doctrines of laches, estoppel, or waiver (I.D. 9-22). He also determined that the existence of the arbitration decision did not preclude agency review, bind the Commission, or permit only limited agency review, but that such decision is to be reviewed *de novo* and accorded due consideration as evidence (I.D. 22-60; *see also* *McDonald v. City of West Branch*, 466 U.S. 284, 292-93, n. 13

(1984) ("McDonald").[5]

After finding without objection that the case is an appropriate one for summary judgment based on the evidence and arguments submitted by the parties (I.D. 60-62), the ALJ turned to a detailed explanation of the positions of the parties on the two specific substantive issues to be resolved: (1) is respondents' interpretation of the Agreement legally correct, i.e., the one adopted by the Commission in approving the Agreement; and (2) have the respondents violated the shipping statutes or Commission orders by their actions with respect to their interpretation of the Agreement?

The ALJ found the arbitral majority's decision to be well reasoned, insofar as it interpreted the Agreement as not requiring a suspension in 1982 when Moore-McCormack failed to make its required 40 sailings (I.D. 69-74). Thus, under the McDonald case, he found it entitled to "some weight as evidence." (I.D. 69).

Although the arbitration majority purported to apply Brazilian law to the issue of Agreement interpretation, the Presiding Officer determined, and Ivarans and the arbitral dissenter agreed, there was no conflict between it and United States law, insofar as principles of contract

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[5] No exceptions have been taken to these portions of the I.D., and we have already affirmed the ALJ on the effect to be given to a valid arbitral decision in the context of this proceeding. See Denial of Petition of A/S Ivarans Rederi for Stay Pending Finality of Proceedings in Brazil, 5, 11, n. 8, served June 22, 1988 ("Denial of Stay").

interpretation were concerned (I.D. 70, n. 14). He found the arbitrators' conclusions based on these principles "well constructed on the basis of available evidence" and indicative of the intentions of the parties (I.D. 73-74).[6]

The ALJ did not, however, base his conclusions solely on the reasoning and findings of the arbitrators, nor did he simply review the arbitrators' decision. He merely utilized its reasoning to the extent he found it persuasive and used the decision itself as evidence (I.D. 69, 74-75). He recognized, as Ivarans contended, that Ivarans' "complaint asks the Commission to 'determine whether a Shipping Act violation exists' irrespective of any arbitration award." (See Ivarans' Motion for Summary Judgment, 51; I.D., 30.) Moreover, the Presiding Officer recognized that the arbitrators' decision was deficient because it did not, and could not, consider the lawfulness of the respondents' interpretation of the Agreement under the Shipping Acts, and thus had to be "supplemented" by such consideration (I.D.,

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[6] Applying the principles of contract interpretation, which included reading the contract as a whole, and giving effect to its intended purposes, the arbitrators had found, with one dissent, that Article 6(e) of the Agreement, which required suspension, was only to be applied in situations where service is not adequate including, but not limited to force majeure, and that, as shown by Article 5(a), deficiencies in national-flag service were to be made up by other carriers in the national-flag group. Such interpretation, the arbitrators found, was in accordance with the purpose of the original agreement, which was to provide for a commercial arrangement allocating 80 percent of the cargo revenue to national-flag carriers, which would be preserved under an interpretation that a national-flag deficiency would be met by other carriers of that flag.

75-77). He explained that while the arbitrators are empowered to make findings with respect to the parties' intentions (which are a relevant consideration), such intentions alone are not determinative in delineating the scope of an agreement approved by the Commission because it is the Commission's intention which determines this matter. See Swift & Co. v. FMC, 306 F.2d 277, 281-82 (D.C. Cir. 1962). The ALJ then went on to determine the Commission's intention as reflected in the language and structure of the Agreement, the history of the approval of the Agreement, the reasons for the approval, and the statutory standards governing such approval.

The Presiding Officer found that when the Agreement was first approved in 1973, approval was found necessary to substitute commercial decision for government decree, stabilize the trade, and implement a government-to-government understanding to encourage revenue-pooling agreements. Further, he explained the essential terms of the Agreement as follows. The Agreement established 80 sailings as a minimum for the national-flag carriers as a group, established minimum sailings for each of the third-flag carriers, and provided for an 80 percent/20 percent revenue sharing between national-flag and third-flag carriers. In 1980, Amendment 10 to the Agreement incorporated into the Agreement terms governing the obligations of national-flag lines among themselves which had originally been embodied in a separate agreement.

Sailings and revenue shares were broken down as 40 sailings and 40 percent revenue shares for U.S.-flag and 40 sailings and 40 percent revenue shares for Brazilian-flag carriers. The modification also required certain direct port calls in Brazil and reduced a party's share for failure to make required calls. In approving the modification, the Commission required that Agreement changes in minimum sailings or port calls be approved by the Commission (I.D. 74-85).

The ALJ enumerated eight consequences which he determined would logically result from an adoption of Ivarans' position and which he found were not intended by the Commission:

1. The Agreement would be suspended even though there were more sailings than the total required by Article 5(a).

2. The Agreement would be suspended where Moore-McCormack's deficiency amounted only to a 15 percent deficiency in sailings and a reduction in service, on average, from one sailing every 1.3 weeks to 1 sailing every 1.5 weeks.

3. The Agreement would be suspended retroactively for the entire year of 1982 even though Ivarans did not notice the deficiency until October 1982, and it has not been shown that Ivarans acted any differently because of Moore-McCormack's deficiency.

4. The Agreement would be suspended even though all other parties, including three over-carriers for 1982 which would be relieved of payments if the pool were suspended, contend that the language of the Agreement does not require suspension.

5. The Agreement would be suspended even if Moore-McCormack failed only to make one of its required sailings, and the other national-flag lines more than made up for the deficiency, despite the fact that Article 6(e) of the Agreement authorizes suspension for sailing deficiencies only in case of inadequacy of service.

6. The Agreement would be suspended for failure of a national-flag line to make some of its sailings although the Agreement as originally signed by Ivarans and approved by the Commission called only for 80 sailings by the national-flag carriers, as a group, and the 40-40 breakdown among national-flag carriers brought into the Agreement by Amendment 10 in 1980 reflects no such intention, nor was any mention of such intention made at the time of the Amendment.

7. The Agreement would be suspended although Article 6(a) specifically provides that if a carrier fails to make its required number of sailings, the Agreement is to continue and that carrier's share is to be reduced and the share of the other

parties within its group (national-flag or non-national-flag) accordingly increased.

8. The benefits and purposes of the Agreement, which was supposed to bring peace and stability to the trade, would be suspended pending reinstitution at some undefined future time.

The ALJ concluded that Ivarans' interpretation was faulty because it concentrated on the literal language of a portion of Article 6(e) and ignored the rest of the Article relating to adequacy of service, failed adequately to treat Article 6(a), which deals with the specific problem presented here and provides a remedy for it, and disregarded the overall intention and purpose of the Agreement and the parties thereto (I.D. 85-89).[7]

The ALJ found that the remedy imposed by the arbitral majority was, unlike its interpretation of the Agreement itself, without basis in, and contrary to the language and purposes of, the Agreement. He pointed out that the Agreement specifically provides that the failure to make the minimum required sailings does not constitute a breach of the Agreement but rather is subject to the provisions of Article 6, which provides for either reduced shares (6(a)) or suspension (6(e)) (See Article 5(h)). The ALJ also noted

[7] The evidence was held not to support Ivarans' contention that the Agreement should be construed against the national-flag lines because the latter lines drafted it. The ALJ noted that the documents submitted by the parties supporting approval did not show who drafted the Agreement but did reflect Ivarans' signature.

the Agreement's provisions dealing with possible forfeiture for undercarriage (Article 7(c)) and division of a carrier's share among remaining members of its flag group upon complete termination of service (Article 10(b)).

Accordingly, the ALJ determined that even in the case where a carrier completely terminates its activities, the Agreement did not impose the stringent remedy fashioned by the arbitral majority. Thus, the arbitral majority's attempt to treat Moore-McCormack's failure to make its required sailings as a breach and to foreclose it from participating in the overcarriage payments made by Ivarans was found to constitute an unauthorized modification of the Agreement (I.D. 75; 90-99).

The ALJ advised that even if notions of "equity" could be applied in fashioning a remedy, there was nothing unfair in the remedy imposed by the Agreement under the circumstances. He pointed out that all carriers reduced sailings in 1982 and Ivarans may well have been an overcarrier in 1982 even if Moore-McCormack had overcarried, as happened in 1981. Moreover, the ALJ found no showing that Moore-McCormack failed to meet its minimum-port-call requirements, or that it earned sufficient revenues to avoid undercarriage forfeitures. Additionally, he explained that there are no facts showing degrees of "aggressiveness of competition," aside from the showing that all carriers reduced sailings in 1982 (I.D. 99-103).[8]

With respect to the ultimate issues in the case, the ALJ concluded that respondents had not violated the Shipping Acts or Commission orders, at least up until the time of his decision, since their interpretation of the Agreement and the 1980 Order were the proper ones. Moreover, since all they had done thus far was to invoke arbitration pursuant to the Agreement, they were also found not to have violated the 1984 Act. The ALJ added, however, if respondents attempted to enforce the unauthorized remedy fashioned by the arbitral majority, they would be violating the 1984 Act by attempting to carry out an unlawful agreement and would be subject to an order to cease and desist (I.D. 103-106).

POSITIONS OF THE PARTIES

A. Ivarans

Ivarans excepts to twelve specific conclusions of fact and law in the I.D., alleging generally that the ALJ erred in failing to hold that the Agreement should have been

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[8] The ALJ advised that it was unnecessary to determine if Moore-McCormack breached a fundamental duty by failing actively and aggressively to compete for all available cargo, as the arbitrators had found, because the Agreement itself provided that failure to meet minimum sailing requirements would not constitute a breach of the Agreement and that an array of penalties, including reduction of share and undercarriage forfeitures, would apply (I.D. 84, n. 21). He also declined to pass upon the arbitral majority's assessment of the majority of costs against USLSA and upon disputes relating to the exact amount of monies owed under the Agreement. He found these matters would be more properly presented by a petition for declaratory order or complaint (I.D. 103, n. 24).

suspended in 1982 and that the Shipping Acts and Commission orders relating to the Agreement so require. These Exceptions to the conclusions of the Presiding Officer are as follows:

1. "The Initial Decision is incorrect in its conclusion 'that the Agreement need not have been suspended in 1982 under the circumstances of that year.'"

Ivarans contends that agreements filed with the Commission must be strictly interpreted according to their literal language, and that the literal language of Article 6(e) of the Agreement requires suspension when a party or combination of parties "exceeding 1/3rd of the total pool share for reasons of their own . . . do not provide [the required] minimum number of sailings . . ." The ALJ, it asserts, erred in interpreting the Agreement subjectively in accordance with what he believed was reasonable, relying not upon Shipping Act requirements for his interpretation but implying authority from the Agreement based upon his own sense of equity and common law principles of contract interpretation.

2. "The Initial Decision is erroneous in its reliance on the decision of the arbitral majority as evidence the Agreement was not suspended for 1982."

Ivarans argues that it was erroneous for the ALJ to rely upon the decision of the arbitral majority because that decision improperly interpreted the Agreement by enforcing a "spirit" of the Agreement, rather than its literal language, and because the literal terms of the Agreement are contrary to the result reached by the arbitral majority. It contends that the ALJ should have followed the dissenting arbitrator and found that the Agreement's terms required its suspension.

3. "The Initial Decision is erroneous in that it rewrites the Agreement in accordance with the Presiding Officer's subjective notions of equity, which are not legitimate considerations under the Shipping Acts."

Ivarans contends that the ALJ in effect rewrote the parties' Agreement by enforcing an intent based upon his ideas of equity. This action, Ivarans maintains, is contrary to the literal language of the Agreement, which expressed the parties' intentions. Moreover, Ivarans asserts that it is not "absurd," as the ALJ found, to conclude, as Ivarans' position would dictate, that the Agreement would be cancelled if a party like Moore-McCormack, which had over one-third of the pool share, failed to make one required sailing even if all other parties had more than fulfilled their sailing requirements. It would, allegedly, be more absurd to reward a carrier that did not meet its required minimum number of sailings under the Agreement. Moreover, Ivarans finds it hard to believe that any carrier, knowing that a single sailing is all that stands between itself and a large pool payment, would not find a way to make the sailing. The suspension clause, Ivarans asserts, is only meaningful if a cutoff point exists, and under the logic of the I.D., no cutoff could exist.

4. "The Initial Decision errs in finding Articles 5(h) and 6(a) inconsistent with Article 6(e) of the Agreement."

Ivarans contends that there is no inconsistency among the various Articles of the Agreement, and that a careful reading of them shows that to be true. Article 5(h), it asserts, merely says that "[i]t is understood that a party's failure to make the minimum sailing/calls specified in this Agreement shall not constitute a breach of same but will be subject to provision of Article 6." Article 6 includes the suspension clause, Article 6(e). Thus, Ivarans maintains, Article 5(h) only means that sailing deficiencies are not breaches that give rise to cancellation of the Agreement, since the Agreement may be suspended under Article 6(e), and then resumes after service is restored. It concludes that Article 6(e) expressly applies when a party or group of parties with more than 33 1/3 percent of the Pool fails to complete its sailing requirement, and suspends the Pool only until service is restored at the "minimum" level provided in Article 5(a) of the Agreement.

5. "The Initial Decision erred in rejecting the conclusion of all three arbitrators that in 1982 Moore-McCormack intentionally breached its duty 'to actively and aggressively compete for all available cargo . . . .'"

Ivarans maintains that Moore-McCormack's failure to meet its required minimum sailings under the Agreement for 1982 was the result of a deliberate decision on the part of Moore-McCormack to remove ships from service to allow them to be restructured to increase their capacity and to avoid the expense of replacing them with temporary capacity. The large pool payment, resulting in part from Moore-McCormack's reduction of its own carryings, is said to be a way to make other carriers pay for Moore-McCormack's ship capacity expansion with the earnings from carrying pool cargo. Ivarans notes that all three arbitrators concluded that Moore-McCormack intentionally failed to perform its "minimum" sailings under the Agreement and is not entitled to be compensated by a payment under the circumstances. It was allegedly error for the ALJ not to have similarly concluded.

6. <u>"The Initial Decision erred in interpreting the Agreement in accordance with an 'intention' of the Commission, which is contrary to the terms of the Agreement, and not stated in the Commission's orders."</u>

Ivarans claims that the Commission specifically ordered the parties to express their true and complete intention at the time when the Commission conditionally approved the Agreement in 1980, and that there is "not a scintilla of evidence" to support the suggestion that the Commission intended to interpret the Agreement in any manner other than the natural reading of its words.

7. <u>"The Initial Decision fails to consider and apply the terms of the Order of Conditional Approval of Agreement 10027-10 issued on December 30, 1980."</u>

Ivarans contends that the ALJ failed to give sufficient consideration to the 1980 Order, which conditioned approval on a new clause in the Agreement specifying that "any change" in the minimum sailings would be filed in advance for Commission approval. To permit Moore-McCormack unilaterally to reduce its 1982 sailings below the minimum provided for in the Agreement without applying the suspension clause would allegedly change the Agreement without Commission approval, thus flouting the terms of the Commission's Order.

8. "The Initial Decision is contrary to the Shipping Acts in concluding that the Agreement may be interpreted contrary to its literal terms."

Ivarans contends that the ALJ erred in refusing to apply the literal meaning of the words of Article 6(e) of the Agreement. The Agreement's literal terms must be applied, Ivarans argues, because of the antitrust exemption which flows from the Agreement, because the national-flag carriers were the drafters of the Agreement, and because Ivarans entered into the Agreement in good faith in the expectation that the parties would apply it as written.

9. "The Initial Decision erred in concluding that Article 6(a) of the Agreement is applicable to the circumstances of the 1982 Pool Year."

Ivarans takes the position that Article 6(e), rather than Article 6(a), applies to the year 1982 because Moore-McCormack is a pool party with over one-third of the pool shares and did not meet its minimum sailings requirement. The interpretation in the Initial Decision to apply Article 6(a) to Moore-McCormack's sailing deficiency, rather than Article 6(e), is allegedly strained, unnatural, and contrary to the express terms of the Agreement.

10. "The Initial Decision erred in concluding that Ivarans was not entitled to a cease and desist order under the circumstances."

Ivarans asserts that the respondents here have already sought to enforce the arbitration award and thus a cease and desist order is appropriate.

11. "The Presiding Officer erred in failing to adequately take into account considerations of United States public policy."

Ivarans asserts that the public policy underlying the Shipping Acts must be considered in carrying them out, and that the interpretation of the Agreement adopted by the ALJ is contrary to the policies of the Shipping Acts to foster competition and improve service, and to United States public policy that antitrust exemptions be strictly construed.

12. "If considerations of equity are appropriate for consideration, then the Initial Decision is inequitable."

Ivarans asserts that equitable considerations are not applicable here and that the Shipping Acts require strict interpretation of the Agreement as written. It also contends, however, that if equitable considerations are taken into account, the result reached by the I.D., i.e., to give Moore-McCormack's pool share to USLSA, is inequitable because it would force the other members of the pool to pay for Moore-McCormack's reoutfitting of Moore-McCormack's ships, which it achieved through a deliberate breach of the Agreement. All of the arbitrators are said to have agreed that such a payment in these circumstances would constitute "unjust enrichment."

B. The Respondents

The Argentinean and Brazilian carriers and USLSA take issue with each and every Ivarans' exception and conclude that the I.D. was in all respects proper and well-founded and should be affirmed.

DISCUSSION

A. The Denial of Stay

Ivarans filed concurrently with its Exceptions a Petition For Stay Pending Finalty of Proceedings in Brazil ("Petition") in which it stated that the arbitration award issued in Brazil with respect to the interpretation of the Agreement had been vacated by a Brazilian court and urged that this proceeding be stayed pending review of that court's decision by the Supreme Court of Brazil. Ivarans maintained that affirmance of the vacation of the arbitration decision by the Brazilian Supreme Court would render this proceeding moot or, in the alternative, deprive the Commission of its jurisdiction. The Commission denied the Petition on June 22, 1988 in the Denial of Stay, which we incorporate here by reference.

As explained in our Denial of Stay, vacation of the arbitration decision would not render this proceeding moot because many of Ivarans' separate causes of action set forth in its complaint related to matters other than enforcement of the arbitration award.[9] Moreover, the threat of enforcement of an interpretation of the Agreement adverse to Ivarans remained apart from the arbitration award, and the counterclaim of USLSA, another member of the Agreement, required independent adjudication even if Ivarans' claim were withdrawn because of the Commission's obligation to pass on interpretations of agreements it has approved. See Denial of Stay, 9-10.

Several additional comments are required with respect to the Denial of Stay in light of latter developments involving Ivarans' Petition to Review our Denial of Stay. The ALJ did not, as Ivarans has asserted in its Opposition to our Motion to Dismiss that Petition on jurisdictional grounds,[10] refuse to rule on USLSA's counterclaim. In fact, he granted USLSA's requested relief both with respect to interpretation of the Agreement and remedy. See I.D. 28-29; 69; 90-103. The ALJ's statement that "This case, after all, is a complaint case brought by Ivarans, not by USLSA" (I.D.

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[9] As Ivarans itself recognized in a pleading before the Presiding Officer, "Any contentions that the Commission is reviewing an arbitration award are red herrings; Ivarans brings this claim to assert its Shipping Act rights . . . . Irrespective of any arbitration award, the question for the Commission is, first and foremost, 'does the conduct complained of exceed the scope of the parties' authority under the Shipping Act?' It is for the Commission, and the Commission alone, to determine whether parties have exceeded the authority in an agreement." (Motion for Summary Judgment, 23-24, n. 14; 51).

[10] See A/S Ivarans Rederi v. United States of America and Federal Maritime Commission, D.C. Cir. No. 88-1597, Response to Motion to Dismiss, 8, n. 2.

103, n. 24), goes not to the basic claim of USLSA but to the issue of the costs of the arbitration proceeding, which was not properly before him because it had not been briefed and there had been no opportunity to reply to it. For similar reasons, he refused to rule on Ivarans' claim with respect to the amount of money owed under the arbitration award. See n. 8, supra.

With respect to an arbitration award's being a prerequisite to Commission jurisdiction, we noted in the Denial of Stay that cases like Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985) and Shearson/American Express v. McMahon, 107 S.Ct. 2332 (1987), were inapplicable because only the Commission, and not the arbitrators, had the authority to determine the scope of its prior approval (see Denial of Stay, 3, 11-16). We further relied on the principle that a party may proceed directly before us notwithstanding an arbitration provision when, as was the case below, the arbitration mechanism was not functioning properly (see Denial of Stay, 14-15).

B. The Merits

A major portion of the Exceptions on the merits is devoted to charging the Presiding Officer with ignoring the literal language of the Agreement, basing his decision on a "spirit" of the Agreement divorced from its language, and fashioning an interpretation of the Agreement based upon such spirit, principles of contract interpretation, and his own sense of equity (see Exceptions Nos. 1, 2, 3, 7 and 8). Ivarans further claims that the ALJ erroneously based his decision on an "intention" of the Commission which it views as contrary to the terms of the Agreement and not reflected in Commission orders. Finally, the ALJ is challenged for allegedly failing to give proper attention to public interest considerations (Exceptions Nos. 6 and 11). All of these Exceptions are found to be without merit and rejected.

The I.D. is based on a careful analysis of all of the language of the Agreement (see I.D. passim, particularly 70-74; 75; 87-89; 94-99). To the extent the ALJ refers to the "spirit" of the Agreement, he treats not a disembodied entity divorced from the language of the Agreement. Rather he considers the Agreement's objective, which he derives from its literal language read in the context in which it appears and in the context of the whole Agreement, taking into account the background against which the Commission approved the Agreement (see I.D. 72-74; 77; 85-89; 99). In reaching his conclusions, the ALJ rejected the application of equitable principles (see I.D., 73, n. 15; 94; 99-100).[11]

Insofar as the use of principles of contract construction and interpretation in determining the Agreement's meaning is concerned, such use is entirely

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[11] We also note that the Brazilian court which vacated the arbitration award found that that award had been based upon legal, rather than equitable, principles. See Petition of A/S Ivarans Rederi For Stay Pending Finality of Proceedings in Brazil, Exhibit A, 63-65.

proper. Ivarans itself has recognized that the Agreement is subject to the ordinary principles of contract construction and interpretation. Indeed, it has so argued to the arbitrators in a document of record here (Ivarans' Motion for Summary Judgment, Appendix, 155-166) as well as to the ALJ (I.D. 89, n. 22) and the Commission (Exceptions, 21). In addition, the propriety of the Commission's employing principles of contract law in interpreting and construing agreements has been recognized by the Commission and the courts. See e.g., FMC v. Australia/U.S. Atlantic & Gulf Conf., 337 F. Supp. 1032, 1037 (S.D.N.Y. 1972); Disposition of Container Marine Lines, 11 F.M.C. 476, 485-86 (1968).

Moreover, while activities cannot be found lawful which are not authorized by an agreement's terms, it does not necessarily follow that mere reading of the language of an agreement is enough to determine if certain conduct is authorized. It is also necessary to examine the background against which an agreement and its relevant amendments were approved. Thus, for example, in Port of New York Authority v. FMC, 429 F.2d 663, 667-68 (5th Cir. 1970), cert. denied, 401 U.S. 909 (1971), the court upheld a Commission finding that general ratemaking authority encompassed the authority to fix a certain type of rates because those rates had been in use for many years with the knowledge of the Commission. Similarly, in Interpool Ltd. v. FMC, 663 F.2d 142, 149-51 (D.C. Cir. 1980), the court explained that whether tariff amendments affecting the leasing of certain containers required specific agreement authorization could not be determined solely by reference to the language of the approved agreement but required an examination of the impact of the practice on competition. See also Cancellation of Consolidation Allowance Rule, 20 F.M.C. 858, 866 (1978).

As the ALJ noted (I.D. 75-77; 85-89), and Ivarans itself admitted (Motion for Summary Judgment, 51-52), since the Agreement exists legally only because it has been approved by the Commission, the Commission's intention in approving the Agreement is critical. Swift & Co. v. FMC, 306 F.2d at 281; FMC v. Australia/U.S. Atlantic & Gulf Conf., 337 F. Supp. at 1037. Accordingly, the Commission's delineation of the scope of the Agreement and therefore the extent of its prior approval must be accorded "leeway" and upheld if it is reasonable. Swift & Co. v. FMC, 306 F.2d at 281. See also Trans-Pacific Frt. Conf. of Japan v. FMC, 314 F.2d 928, 935 (9th Cir. 1963). As far as our intentions in approving the Agreement in 1973 and Amendment 10 in 1980 are concerned, we find that the Presiding Officer is correct.

There is nothing in our actions relating to the Agreement, including the Commission's 1980 Order conditionally approving Amendment 10, that supports the interpretation advanced by Ivarans. That Order required the parties to express their true and complete intention in the Agreement modification at the time of its approval. Both the language of Amendment 10 and the 1980 Order clearly indicate, as the ALJ found (I.D., 79, 87), that the

Amendment (establishing minimum port calls and incorporating a 40/40 sailing requirement for Brazilian and U.S.-flag carriers) in no way modified the original Agreement's basic provisions. It remained true that failure to meet required sailings under the Agreement would not constitute a breach of the Agreement (Article 5(h)), that in the event a party failed to meet its required number of sailings its pool share would be decreased and the share of others in its flag group increased proportionately (Article 6(a)), and that the pool would only be suspended in the case of inadequate service (Article 6(e)). Moreover, Moore-McCormack's unilateral act in failing to make its required number of sailings in 1982 cannot constitute a modification of the Agreement. See American Mail Line Ltd. v. FMC, 503 F.2d 157, 166 (D.C. Cir.), cert. denied, 419 U.S. 1070 (1974), rehearing denied, 421 U.S. 1017 (1975). Finally, there is nothing in the record indicating that the Agreement interpretation argued by Ivarans was intended by any of the parties. Nor is there anything in the 1980 Order to show that it was intended by the Commission.

We also find no error in the ALJ's treatment of the public interest issue (see I.D., 76-79; 85-89). The public interest standard in a given agency's regulatory statute is not to be construed as embodying every public interest consideration generally, but is confined to particular areas of that agency's concern. See NAACP v. FPC, 425 U.S. 662, 669 (1976). In any event, there is no "public interest" standard in the sections of the 1984 Act cited by Ivarans as the basis of its complaint, or indeed in any section of the 1984 Act. Phrases like "public interest" and "detriment to commerce" under which the Commission considered other legislative policy prior to 1984, such as that underlying the antitrust laws, were specifically excluded from the 1984 Act. See California Cartage Co. v. United States, 802 F.2d 353, 355-58 (9th Cir. 1986); cf. Denver and Rio Grande Western Railroad Co. v. United States, 387 U.S. 485, 492-93 (1967).

On the other hand, at the time of the Agreement's approval the Commission weighed its antitrust implications against its needs, benefits, and purposes under the then applicable "public interest" standard. See FMC v. Svenska Amerika Linien, 390 U.S. 238, 243-46 (1968). In fact, the 1980 Order finds that the Agreement provides "important public benefits by permitting the continuation of service without governmental confrontation; the guarantee of service through minimum sailing requirements; and the broader choice of carriers by shippers of cargo subject to the pool." Ivarans' Motion for Summary Judgment, Appendix, 25.

Several of Ivarans' Exceptions (Exceptions Nos. 4 and 9) are directed to the interpretation and construction of the various Articles of the Agreement. Ivarans contends that a proper reading of these Articles requires suspending the Agreement because of Moore-McCormack's failure to make the 40 sailings required under the Agreement. We disagree.

To interpret the Agreement as Ivarans does would do violence to the language of the Agreement as written by, in effect, deleting language, qualifying existing language, or adding language. On the one hand, Ivarans' interpretation would ignore the word "adequate" in Article 6(e), thus removing the Agreement's treatment of adequacy of service as a condition for suspending and reinstituting the Agreement. It would also read out the reference in Article 6(e) to Article 11, which deals specifically with suspension and relates to force majeure type situations, not the mere failure to complete required sailings, which is handled in Article 6(a).

On the other hand, by its construction of the Agreement, Ivarans would add words to, or condition the present language of, Article 6(a) so that the prescribed remedy for failure to make required sailings, i.e., adjustment of carrier shares, would apply only to non-national-flag carriers. This is contrary to the clear language of Article 6(a) which, unlike Article 5, makes no distinction between carriers and on its face applies in the same manner with respect to national and non-national-flag carriers.

Finally, Ivarans' construction of the Agreement reads into Article 5(h) the word "cancellation." This adds an entirely new dimension to the Agreement by creating a distinction between breaches that do and breaches that do not result in cancellation of the Agreement. Cancellation, treated in Article 10(a) of the Agreement, occurs only upon unanimous agreement of the parties or operation in the pool area by national-flag carriers which are not pool members, considerations not relevant here. Article 5(h), on the other hand, addresses the situation of a line's failure to meet its required sailings and states that such failure is not a breach of the Agreement.

The eight consequences which the ALJ noted would logically flow from Ivarans' interpretation of the Agreement also militate against Ivarans' interpretation.[12] (see I.D. 86-88). The literal language of the Agreement, the background against which the Agreement was approved, in particular that reflected in the memorandum submitted by all parties (including Ivarans) at the time of its approval, and the terms of the Commission's approval all support the Presiding Officer's finding that such consequences were not

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[12] Ivarans' argument that suspension would not occur in the case of a carrier's single missed sailing (the ALJ's fifth "unintended consequence" flowing from Ivarans' approach - see I.D. 86-87), because any carrier, knowing that a single sailing is all that stands between itself and a large pool payment, would find a way to make the sailing is in effect an acknowledgement that its construction of the Agreement is unnatural. The language of the Agreement makes no distinctions based on the number of deficient sailings. Thus Ivarans is forced to speculate upon what a particular carrier may or may not do when a sailing deficiency appears likely. The remedy for a single missed sailing is the one already provided by Article 6(a) of the Agreement, namely the adjustment of the pool share of the other carriers in that carrier's flag group. It is not the suspension of the entire Agreement.

intended.[13]

A major difficulty with Ivarans' position that the failure of a major party to the Agreement to fulfill its minimum sailing obligation results in suspension of the Agreement is Ivarans' inability to come to grips with the Agreement's treatment of the requirement of adequate service. Firstly, if in fact the failure of a major party to meet sailing requirements by itself requires suspension of the Agreement, why did Article 6(e) not merely so state? Why does it go on to provide that "the pool [is] to be suspended for such duration and the pool [is] to be resumed only when adequate service is again restored"? This language would appear to contemplate a condition temporarily causing inadequacy of service as a predicate to suspension of the Agreement, and a lifting of the suspension upon the restoring of adequate service. Under normal principles of construction, all words in a contract are to be given effect. See, e.g., Sacramento-Yolo Port Dist. v. Fred F. Noonan Co., Inc., 9 F.M.C. 551, 558-59 (1966). Ivarans'

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[13] Ivarans objects to the Presiding Officer's characterization of its interpretation of the Agreement as "absurd" (Exceptions, 12-14). What the ALJ finds is not that an interpretation such as that advanced by Ivarans would be "absurd" in the abstract, but rather that it was absurd in light of the intentions of the parties and the Commission. The parties could have defined their obligation as described by Ivarans, and the Commission could have approved the obligation as so defined. This is not, however, what happened. In any event, regardless of what the Presiding Officer may have intended, we find that Ivarans' interpretation of the Agreement would create results which, if not "absurd," were not those intended by the parties or the Commission.

interpretation would render surplusage the language which we here quote.

Secondly, words in contracts, including Commission-regulated agreements, absent some clear indication to the contrary, are to be given their normal meaning. Id. There is nothing in the Agreement or elsewhere to indicate that "adequate service" was intended to mean other than sufficient to meet the overall needs of the trade as envisioned by the Agreement. In ordinary usage, one would not say that inadequacy existed if overall needs were met, and this has been the way the Commission itself has treated matters of adequacy in general. See, e.g., Intermodal Service to Portland, Oregon, 17 F.M.C. 106, 131 (1973); Sea-Land Service, Inc. v. S. Atlantic & Caribbean Line, 9 F.M.C. 338, 349-50 (1966); Stockton Port District v. Pacific Westbound Conf., et al., 9 F.M.C. 12, 33-34 (1965).

Thirdly, original Article 5(a) specifically defined sailing obligations of the national-flag carriers to be 80 sailings as a group, and trade stability and adequacy were viewed at that time in terms of a trade-wide sailings obligation and national-flag group and non-national-flag group obligations within this overall obligation. Deficiencies of particular lines were to be made up by other members of their flag group. Although in 1980 the sailing requirements of the members of the national-flag group were separately stated, there is nothing in the 1980 Order approving this separate statement to indicate it was intended to modify the parties' or the Commission's understanding of "adequacy" in any way which is material here.[14]

Lastly, Ivarans' contention that the interpretation of the Agreement adopted by the ALJ creates uncertainty because it lacks a cutoff point for suspension of service is without merit. Suspension is terminated when adequacy of service resumes, and adequacy is determined in terms of overall service to a port as defined by the Agreement. It is clear

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[14] Ivarans cites several cases which it contends support the "literal" interpretation of the Agreement it seeks. Joint Agreement, Far East Conference and Pacific Westbound Conference, 8 F.M.C. 553, 558 (1965) ("Joint Agreement"), aff'd in relevant part, rev'd as to other issues sub nom., Pacific Westbound Conference v. Federal Maritime Commission, 440 F.2d 1303 (5th Cir.), cert. denied, 404 U.S. 881 (1971) and Pacific Coast European Conference, 14 F.M.C. 266, 278 (1971), involved a question far different from the one presented here. Those cases were concerned with whether certain ratemaking actions were covered by an approved agreement or required additional specific Commission approval. Here there has been express approval of the matter in issue and the only question is what that approval means. No one contends that suspension was not dealt with adequately in the Agreement or that additional suspension approval is required. The interpretation adopted does not constitute one flowing from a "tacit" or "implied" approval, doctrines which have been clearly rejected in Joint Agreement among other cases. Cf., Pacific Coast European Conference, 14 F.M.C. at 280.

In Agreement Nos. T-1685, T-1685-6 & T-3130, 19 F.M.C. 440, 445, n. 8 (1977) ("Agreement T-1685"), the Commission found an ambiguous agreement should not be approved. Obviously, as a matter of first instance, the Commission should obtain clarification of ambiguous agreements. However, there are agreements which, although permitted to become effective, require clarification. The Commission itself recognized in Agreement T-1685 that "[i]t may be argued that the Commission can resolve ambiguity in a previously approved agreement . . ." (at 445, n. 7), and it has done so in numerous cases. See, e.g., Swift & Co. v. FMC, 306 F.2d at 281-82; Disposition of Container Marine Lines, 11 F.M.C. at 485-89.

when, because of _force majeure_ or other reasons, adequate service does not exist, and equally clear when such conditions cease. On the other hand, Ivarans' interpretation itself introduces uncertainty because it fails to define when service becomes inadequate in the first place or when it later becomes adequate.

In the context of the events here, it is clear that suspension did not in fact occur because service under the Agreement never became inadequate. There were no events which temporarily required agreement suspension and both flag-group and trade requirements were more than met. Indeed, at the time Ivarans claimed the Agreement should be suspended because Moore-McCormack would not meet its minimum sailings, the national-flag lines had already overfulfilled their 80-sailings requirement (_see_ I.D. 83).

We also concur with the Presiding Officer's finding (Ivarans' Exception No. 5) that, given the Agreement's terms, it was unnecessary to consider Moore-McCormack's alleged "intentional breach" of the Agreement (_see_ I.D. 84, n. 21, 95-103). The Agreement makes no distinction between "intentional" and "unintentional" failures to meet sailing requirements insofar as "breach" of the Agreement is concerned, and in fact specifically states that failure to meet such requirements "shall not constitute a breach" of the Agreement. _See_ Article 5(h). Moreover, considerations of Moore-McCormack's motivation would introduce notions of equity into the interpretation of the Agreement. This, as

Ivarans observes, would not be proper.[15]

Even assuming, arguendo, that equitable considerations may be used in finding the intent of an agreement, we do not agree with Ivarans that the Initial Decision is inequitable (Exception No. 12). Ivarans asserts that USLSA should not be permitted to obtain Moore-McCormack's pool share because the other members of the pool would then be forced to pay for Moore-McCormack's reoutfitting of its ships, allegedly achieved through a deliberate breach of the Agreement. Ivarans states that all of the arbitrators found that payment to USLSA in such circumstances would constitute "unjust enrichment."

The record will not support a finding that Moore-McCormack ceased operations before reaching its required sailings in 1982 solely because it desired to reoutfit its ships. Nor is the fact that the arbitrators found that payment to USLSA would constitute unjust enrichment entitled to weight when, as noted above, the Agreement itself expressly provides that a failure to complete required minimum sailings is not a breach of the Agreement (Article 5(h)) and specifies the penalty which will apply for such

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[15] If consideration could be given to the motivation underlying Moore-McCormack's actions, Ivarans is hardly in a position to argue that it was misled by Moore-McCormack to its disadvantage. All carriers reduced sailing in 1982 and the ALJ found, without exception, that Ivarans could have been aware of its position as an overcarrier at least three months before it had become apparent that Moore-McCormack would not complete its minimum sailings for that year (see I.D. 79-80; 83-84; 100-01).

failure, namely share reduction (Article 6(a)) and undercarriage forfeitures (Article 7(c)).

Moreover, the record will not support the conclusion that Ivarans overcarried because Moore-McCormack undercarried. Ivarans was an overcarrier in 1981 when Moore-McCormack met its minimum sailings (I.D. 83). All lines decreased their sailings in 1982 (I.D. 84). Ivarans itself reduced its sailings between 1981 and 1982 by almost 14 percent, and was an undercarrier in two of the four pools, although overall it was an overcarrier (I.D. 67). By the time Ivarans became aware that Moore-McCormack would not meet its minimum sailings and claimed the Agreement should be suspended for the entire year 1982, the national-flag lines had already overfulfilled their 80-sailings requirements (I.D. 83). The ALJ noted with no exception taken that Ivarans did not realize that Moore-McCormack would not meet its 40 sailings until October 1982, and that there was no showing that Ivarans acted any differently because of Moore-McCormack's failure as far as providing sailings or earning revenues are concerned (I.D. 86).

We also concur with the Presiding Officer's determination that Ivarans was not entitled to the entry of a cease and desist order under the circumstances here (see Ivarans' Exception No. 10). Nothing has been shown to indicate that respondents have attempted to enforce the improper remedy fashioned by the arbitrators. To date they have merely "homologated" the arbitration award, an action which only constitutes a judicial approval of the arbitrators' decision. The "homologation" is not in any way self-enforcing, and an additional action to enforce would be required. Moreover, at least as of this time and so far as we are aware, the arbitration award is unenforceable, having been vacated by the Brazilian courts.[16]

At this point some clarification of our position with respect to the arbitration decision appears appropriate. Because the arbitrators' decision has been vacated, at least as of this date, we have not relied upon that decision in reaching our decision here. However, the facts considered by the arbitrators are of record, having been made a part thereof as a result of Ivarans' filing with the Commission of its arguments and evidence submitted to the arbitrators and the filing of the arbitration decision itself. <u>See</u> Ivarans' Motion for Summary Judgment, Appendix, Documents 5, 6, 7. Moreover, to the extent the Presiding Officer's and the Commission have relied upon reasoning similar to that of the arbitrators, it is because it has been found to be convincing, not because it was embodied in an arbitration

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16 The Commission's Denial of Stay of this proceeding required Ivarans to inform us of any action taken by the Brazilian Supreme Court on review of the lower court's vacation of the arbitration decision. We have not been advised of any action taken by the Brazilian Supreme Court.

decision.[17]

Ivarans has contended before the Court of Appeals for the District of Columbia Circuit, in opposing our Motion to Dismiss on jurisdictional grounds its Petition for Review of our Denial of Stay of this proceeding, that the record before the Commission will be deficient if our decision is rendered before the Brazilian courts rule on the legal sufficiency of the arbitration proceedings. (See A/S Ivarans Rederi v. United States of America and Federal Maritime Commission, D.C. Cir. No. 88-1597, Response to Motion to Dismiss, 14). This argument is not persuasive. The fact that recourse was first had to an arbitration panel shows neither the error of such approach nor its necessity (Denial of Stay, 13). We have found that this case is one which in fact does not require prior arbitration proceedings (Denial of Stay, 3, 10-16).[18] Because it appears that no decision has been reached by the Brazilian courts, we have

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[17] Although vacating the arbitrators' decision because of a technical defect, the Brazilian court finds no fault with the legal reasoning processes adopted by the arbitral majority. See Petition of A/S Ivarans Rederi For Stay Pending Finalty of Proceedings in Brazil, Exhibit A, 63-65.

[18] There is a statement of the Presiding Officer (see I.D. 18-19), which, if read out of context, might suggest that arbitration was a prerequisite to this proceeding. However, a careful reading of this passage indicates that it relates to the general propriety of seeking arbitration prior to proceeding before the Commission and not to the specific situation involved here - i.e., the determination of what has been approved by the Commission and whether that approval and the Shipping Acts have been violated, matters which the ALJ recognized can only be resolved by the Commission and for which resolution no prior reference to arbitration is necessary. See I.D., 33-34; 35, n. 9, 75-77.

based our decision on the existing record, which includes evidence presented to the arbitrators, as well as much additional evidence (see I.D. 69; 70-74; 74-85).

A final word should be said with respect to the record generally and any deficiencies which may be found therein. This is a complaint case and therefore Ivarans has the burden of proof and must bear the risk of non-persuasion caused by any absence of evidence on points it wishes to establish. Boston Shipping Ass'n v. FMC, 706 F.2d 1231, 1239-40 (1st Cir. 1983).[19]

CONCLUSION

We conclude that the Initial Decision of the ALJ is proper and well founded and that the Exceptions are without merit. We therefore adopt the Initial Decision with the clarification that in reaching our decision the evidence presented to the arbitrators which was also of record here has been considered, but not the arbitrators' decision itself. We find that the Agreement is not automatically suspended upon the failure of a major carrier to make its required 40 sailings. This is in accord with both the

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[19] Thus, for example, Ivarans' observation that there is no evidence contrary to its allegation that the national-flag carriers were the drafters of the Agreement (Exceptions, 21) would still not relieve it of the burden of proof on this issue. The allegation is certainly not self-substantiating. We note in this respect that Ivarans signed the original Agreement without objection or any indication of coercion, that the ALJ so found, and that Ivarans has not excepted to this finding. See I.D., 89, n. 22.

parties' intentions and the Commission's intent in approving the Agreement as shown by the language and structure of the Agreement, the history of the approval of the Agreement, the reasons for approval, and the statutory standards governing approval. Moreover, we find that respondents' actions to date with respect to the Agreement and the arbitrators' award have not violated the Shipping Acts or Commission orders and do not require the issuance of a cease and desist order.

THEREFORE, IT IS ORDERED, That the Exceptions of Ivarans are rejected; and

IT IS FURTHER ORDERED, That the Initial Decision is adopted as clarified herein; and

IT IS FURTHER ORDERED, That the Denial of Stay of this proceeding is reaffirmed; and

IT IS FURTHER ORDERED, That Ivarans' complaint is dismissed and this proceeding is discontinued.

By the Commission.

Tony P. Kominoth
Assistant Secretary